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ABSTRACT

The format of this monograph follows essentially the arrangement of the day-long conference on Serrano vs. Priest: a major paper presentation, followed by a panel of three respondents, and subsequent general discussion involving the audience and conference participants. The editors have attempted to provide both the formal and the extemporaneous remarks of the speakers. The speakers and their topics are (1) John E. Coons, "An Appraisal on Serrano"; (2) Robert Winger, "Can Serrano v. Priest Be Adopted in Oregon"; (3) David B. Frohnmayer, "The Constitutional Doctrine of Serrano v. Priest"; (4) Laird Kirkpatrick, "The Poor View Serrano"; (5) Charles S. Benson, "Serrano and State Legislatures: Issues of Equality, Quality, and Household Choice"; (6) Richard A. Munn, "Alternative Financial Structures for Oregon Public Education"; (7) Jason Boe, "Serrano, the Oregon Legislature, the Governor's Proposal, the Alternatives and the Dilemma"; and (8) John Edmundson, "Equality, Quality and Household Choice." Appendixes contain (1) a first appraisal of Serrano by John E. Coons, William H. Clune, III, and Stephen D. Sugarman; (2) the complete text of the Serrano decisions; and (3) brief summaries of similar cases in other States. (Author/JF)

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RESTRUCTURING SCHOOL FINANCE

LEGAL AND FINANCIAL IMPLICATIONS OF THE *SERRANO* CASE FOR THE STATE OF OREGON.

University of Oregon
School of Law
April 14, 1972

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FOREWORD

On August 30, 1971, the California Supreme Court rendered a momentous decision on the now famous *Serrano* case.[1] The effects of that decision on the funding of common schools are already being felt in several states.[2] Certainly it has prompted discussion and debate among school administrators, constitutional lawyers, and state legislators in every state.

In the Fall of 1971, a number of educators, administrators, legislators, and attorneys in Oregon voiced an interest in promoting a better understanding and wider public awareness of the possible impact of the *Serrano* decision. It was decided that a conference would provide the best vehicle for bringing together a group of knowledgeable experts in the fields of law, finance, and public policy as an aid to policy makers and citizens in the state of Oregon who must struggle with the very real problem of funding public education. In light of those objectives, the planners and sponsors of the conference hope that all interested persons, especially those in the executive and legislative branches of government, find this document of value in the months ahead. The editors strongly suggest that the papers and other materials contained in this volume are of interest to policy makers and citizens outside the State of Oregon as well as within.

The format of the monograph follows essentially the arrangement of the day-long conference from which it results: a major paper presentation, followed by a panel of three respondents, and subsequent general discussion involving the audience and conference participants. In some cases, the verbal presentations of speakers digressed from their formal written papers; the editors have attempted to provide the reader with the benefit of both the formal and extemporaneous remarks of the speakers. An effort was made to divide the conference into two logical subject areas. In fact, the legal and financial issues are so often intertwined that discussion in both sections may deal with the legal as well as the financial ramifications of the decision. Finally, the material contained in Appendices A, B and C are intended to present additional material of importance to the *Serrano* debate.

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[1] *Serrano v. Priest,* 5 Cal 3rd 584, 487 P.2d 1241, 96 Cal. Rptn. 601 (1971). The decision is printed in its entirety in Appendix B.

[2] See Appendix C for a listing and "box score" of similar cases in other states.

The editors express their appreciation to the following sponsors of the conference:

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INTRODUCTION

Frank Van Dyke

My fellow students of school finance: honored guests from out of state and educators, legislators, legislative candidates and interested citizens of the state of Oregon:

We appreciate the interest and concern demonstrated by those of you who have come to us from out of state to help us sort out and reach sound solutions to the knotty problems of school finance.

May I point out to our guests that in Oregon you are treading on fertile ground. Not only are you walking on the widely reputed loam of the Willamette Valley, but you are visiting a state which is ready for a change in the way it finances its public schools.

Governor McCall opened the debate late last month when he recommended elimination of homeowner property taxes, to be offset by a one percent payroll tax and an increase in personal income taxes.

Oregon's legislative interim committee on taxation, which has been working very hard on a solution to the school finance problem, will announce its findings on April 21.

Furthermore, a suit was filed February 17 in the Circuit Court of the State of Oregon for Lane County, here in Eugene, against the state of Oregon and a number of its state officials, challenging the way in which Oregon uses property taxes to support its schools. Some progress appears to have been made in this case recently, when by stipulation, the number of defendants was reduced from seventeen to three. Our attorney general expects the case to clear Oregon's courts before the next legislative session in January, 1973.

So, as you can see, the turf is being turned in Oregon. The time is ripe for Oregonians to set aside regional and partisan interests, to be willing to make some political compromises, and to use a statesmanlike approach in seeking to solve the problems of school finance.

Let me urge my fellow Oregonians to roll up their sleeves, to gather information and suggestions diligently and to help make this workshop a productive and meaningful one, by undertaking to generate some new thinking about an old problem.

Let us then nurture these seeds to fruition, to ensure a harvest of which we can be proud and in which we can all share. Let's give our children their most important portion of the bounty, in the form of quality education supported regularly by adequate financing, but let us not forget that all Oregon's citizens must benefit from our efforts to establish in this state a system of taxation that will spread more fairly and equally the costs of the governmental benefits we enjoy.

To that purpose, let us dedicate our efforts today.

AN APPRAISAL OF SERRANO*

John E. Coons

The problems of school finance like most problems of finance are intertwined with problems of more human dimensions–problems of social and economic implications. I think for simplicity's sake it may be useful for me to divide them into three parts. First, is the kind of problem we all face when we think of spending the limited money that we have, problems of priority. Given a finite number of dollars to spend on public education we make up our minds what's important. Or in this case I suppose the legislature makes our minds up for us by spending more on high school than on elementary school children, or more on vocational than the ordinary curriculum. It spends more in other words for the kinds of preferences legislatures have including the kinds of things that lobbyists bring home to them. This may be rational by your standards or maybe not but in any event some kind of decision emerges. There is no other way, no other process that we know of than simply to sit down and try to decide.

Given this inevitable choice among rational kinds of dispensation of money for various uses we have a second kind of problem. This is the kind of problem I think that we'll spend much of our time talking about today. It's exemplified in *Serrano* and in similar cases, the problem of distribution or fairness as between children of the same general type. That is, given a couple of normal children in the fifth grade in Oregon from one district to another, how do we rationalize and justify (or can we) the distinctions in spending between these two fundamentally similar children.

However, even if one were first to satisfy his own spending preference or priorities and if he were, second, to create an utterly fair system of distribution from one district to another–one school district to another, one child to another–it is still possible that you might share a third concern. And that is the concern about choice. One may find that the schools are utterly equal in a given community in a given state but unless you happen to be rich like us, it's very hard for families to do other than accept what the state is willing to give them. Some of us consider that something of a problem.

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*Editors note: These remarks were delivered by Professor Coons at the conference. It was intended to expand some areas of his previously published "A First Appraisal on Serrano" which is included herein as Appendix A.

So let's put this discussion in the framework of **first**, sensible priorities of spending; **second**, justice or fairness as between pupils in the same general position; and **third**, questions of freedom of choice.

Now in addressing an audience which is very mixed between lawyers, educators, and others it may be useful to set some background and define some terms, such as wealth and effort. Let's start out by talking a little about the historic systems that have supported schools in most of our states. With the exception of Hawaii, we have had a decentralized form of school finance in the sense that the local property tax has in 49 of our states contributed more or less to the funding of public education. Because of the pattern of property wealth distribution, this means that some districts are taxing themselves much more heavily for a smaller school spending than other districts of greater wealth. Examples are legion and in *Serrano* itself references are made to places like Beverly Hills, on the one hand, and Baldwin Park on the other. Beverly Hills with its gigantic tax base of perhaps $50,000 to $75,000 per child levies a very minimal local tax but produces very high spending; nearby Baldwin Park with no "miracle mile" and very little industry but a high population of children levies two and a half times the tax rate of Beverly Hills but produces about half the school spending level—$600 in Baldwin Park and something like $1400 in Beverly Hills.

This is not an exaggerated kind of statistic. Spending in California ranges from about $475 per pupil up to $3500. Districts with the $475 spending level tend to have taxes that are several times the tax rate of the districts with a range of $2000 to $3000 expenditure. I believe that such districts that spend at the highest level, send their children to Europe every summer on the gleanings of a local property tax, usually below 1%, while the average district I suppose is up around four or five percent of assessed value and is unable to grant the children a European trip in the summer. In any event that's a gloomy picture, even gloomier for those who happen to live in Baldwin Park. Note that by "wealth" I mean taxable property per child in the district. This is the meaning incorporated in the statutes which provide for the funding of public education. I certainly would not regard this as the ideal test of economic power, but it is the test that the state has imposed on the system by its legislation. That is the way the money is raised except whatever is added by the state equalization system which is grossly inadequate in any case to offset the differences in wealth from district to district. Indeed, in California and certain other states, state equalization has sometimes aggravated the problem.

The history of the present litigation tells us something, I think, about the meaning of *Serrano* and the Texas and Minnesota cases and the others that are going to be coming along. The first of the finance cases was begun in 1968 in Detroit; the school district filed a complaint in the Michigan courts suggesting that the 14th Amendment guaranteed every child in Michigan a level of spending according to his personal needs. Not a bad idea when you think about it; it may very well be sensible as a matter of policy to say that we ought to spend money on children in accord with their personal characteristics. The difficulty with that proposition is its ambiguity and unenforceability as a matter of constitutional law. The judges who dealt with that proposition in similar cases in Illinois and Virginia during the same year said it is "judicially unmanageable." I think that's right. I don't really understand how a judge would give every child the special attention that would be required to determine what he had coming in the way of spending. Even if one knew precisely what spending did for children (which nobody does) it would be an impossible judicial burden.

So one can sympathize with the judges in the federal courts that turned this claim down and with the Supreme Court which summarily affirmed those decisions.

Fortunately, one of the cases which was filed in that rash of litigation which came after the Detroit complaint was filed in the Superior Court of Los Angeles, California. The state courts sometimes tend to move at a somewhat more deliberate pace. While the Illionis and Virginia cases went down the drain, the lawyers in *Serrano* had an opportunity to refine their ideas and to change the focus of the litigation. By the time it reached the California Supreme Court the emphasis was no longer on setting of spending priorities through the constitution but had been narrowed down to a much more modest compass. As presented and decided the issue was simply whether the state had the right under the equal protection guarantee of the 14th Amendment to make the level of spending for any child's public school education a function of wealth other than the wealth of the state taken as a whole.

Let me repeat that proposition as it has emerged from the cases: that the quality of a child's education measured in terms of dollars spent may not be a function of wealth. Now let's see first what that doesn't imply. It is in itself a negative proposition you will notice. It doesn't say that the state has to do anything in particular. It has been misunderstood by the press, at least, in the original rash of reports that came after the decision. There were even suggestions that the property tax itself had been declared unconstitutional. I regret to say that this ancient curse is alive and well and is likely to remain so for the foreseeable future. Nor is there any suggestion except of the most minimal kind that there is a requirement of equality of spending throughout any state On this subject there is some language in *Serrano* which is ambiguous and which we may want to talk about later, but let me just say for the moment that, as I read *Serrano*–and certainly as both the Minnesota and the Texas cases which followed make clear–the standard does not require homogeneity of spending for the same class of children from district to district.

Nor does the decision have anything to do with the oppression of minorities. It is not a black-white confrontation; indeed, in California if there is discrimination in the existing situation it is entirely possible that it cuts the other way. In California minority people show a mild statistical tendency to live in districts which are slightly above average in assessed valuation per pupil. That's not so surprising, because they tend to live in Los Angeles which is very big and whose statistics tend to dominate the system. And they tend to live in San Francisco which is relatively large and wealthy. Many, however, live in the desperately poor districts–rural areas or in poor suburbs–and so it is hard for me to think that one should view the present systems as a bonanza for these minorities. Later we can return to the question of how they will fare in any kind of reshuffle. It is closely intertwined with the question of the fate of the poor.

The effect of *Serrano* on low income families is equally ambiguous. The poor also sometimes live in wealthy districts. Berkeley has as its neighbor a district called Emeryville which is a very rich school district inhabited largely by very poor people. It is largely uninhabited because it is mostly industry, but those who do live there have the advantage of spending $2500 per child at a tax rate that is minimal. You don't need much of a tax when you have all that smoke belching out of the factories. *Serrano* is no good news to them because they are going to keep their smog and lose their tax base. Here it becomes plain that there are real anomalies in the outcome. *Serrano* really has less to do with rich and poor than with rationality in government. Its promise is to persons of all classes and it strives toward systems which are dominated by the human mind and human needs instead of by the educationally meaningless distribution of property wealth with its unhealthy invitation to industry to cluster in tax havens like Emeryville.

Likewise, *Serrano* does not speak directly to the problem of the city. It does not necessarily promise any economic redress for the central city's heavy responsibility for police, fire, welfare, and other kinds of special problems not shared to the same degree by suburbs or by rural school districts. Many supposed at first that being based upon wealth discrimination *Serrano* must be a weapon in the war on poverty or the competition between cities and the suburbs; I do not see that as the case. The cities are not all poor by the standards applied in *Serrano*. San Francisco, indeed, is relatively wealthy as I mentioned; New York is relatively wealthy. On the other hand there are many cities which are relatively poor—Newark, Elizabeth and, in my own state Fresno, Modesto, and San Diego. The point is that some will be helped and some will be hurt; all other things being equal.

Finally, the *Serrano* decision has nothing directly to do with the federal government. It does not require the federal government to engage in any particular kind of activity with respect to education. If the federal government were, in its spending, preferring wealthy families or preferring wealthy school districts there would be a problem under the implied equal protection of the 5th Amendment. The federal government is not now doing anything very obviously of this sort. There are, however, some policy implications for federal government programs such as the impacted areas aid program. If there is time we will come back to that.

There is nothing in the constitution to require the reduction of wealth disparities among the states. If the wealth discrimination we described among districts in California seems aggravated, consider the disparity between Mississippi and California or New York or Oregon. I'm sure you all are familiar with the statistics. There is no constitutional handle that I know of for that kind of disparity. Congress does not create and control states as the states do their school districts. And we are still a federal union.

Now what does *Serrano* do, if anything, after all that. It requires the first fundamental re-examination by the legislature of the structure of public education since its conception. It is no longer possible to run the system of public education without going back to the grass roots, to bedrock. The state must put together a whole system of funding of public education and at the same time re-examine its governance. To put it another way, *Serrano* liberates the legislature from its historic political straight jacket; reform has always floundered because of the political dominance of rich districts. Indeed that dominance supports the legal argument, for only courts can provide this kind of liberation. The present discrimination is not going to change without judicial intervention.

Now this is a useful idea in litigation. The court has always been moved more by what it calls "disenfranchised minorities" than it has by discriminations which could well be remedied by the legislature without court intervention. Another example of a helpless minority is the problem of the accused person in the criminal process. He's not likely to have much of a lobby representing him, and so the court is more willing to intervene to insure the fundamentals of due process. Likewise with reapportionment. If the city was not rescued from the electoral bind in which it found itself as a result of population shifts, the legislature could not do it. In educational discrimination the court may very well intervene on the notion either that the poor school districts are structurally incapable of moving the legislature, or secondly that the children themselves represent a kind of disenfranchised minority in the literal sense that they don't vote and have no control over the political manipulation of their lives.

Since I have now touched on the legal argument, let me describe it more fully before I return to the significance of *Serrano*. The rest of the legal argument involves what the Supreme Court has called "suspect classifications" and "fundamental interests." Certain legislative classifications such as race–and, as here, wealth–are given unfriendly scrutiny by the court. Thus, classification of pupils by the wealth of their school district is of doubtful legitimacy and helped the California Supreme Court, as it may help the United States Supreme Court, to strike down the system. This classification argument is coupled in this case with what we hope is the "fundamental interest" in education. The court has given special protection to certain kinds of interests which it has thought more important than others. As early as 1942 it gave special weight to the interest in procreation in *Oklahoma vs. Skinner*, the famous sterilization case. The interest in a fair criminal process has been given emphasis since the fifties in cases involving the right to a transcript for an appeal by an indigent person, or the right to a lawyer on appeal. The interest in voting has been repeatedly and recently given special protection. The California Supreme Court says education is of this same quality. We shall see. The United States Supreme Court has recently manifested nervousness respecting such special equal protection rules.

Another important feature of the *Serrano* argument from the point of view of the judges is that the state can have most of what it wants out of the present system; the kind of discrimination that now exists is not crucial to any legitimate purpose held by the state. Let me put this another way. The state says in defense of its existing system that it wants to preserve variety and independence in local government. I think that's a good idea. I'm very fond of variety in decisions made at the local level. This is at least a plausible kind of public policy. But if that is the state's objective, does the present system promote it? Does it advance local control to say to the poor districts in California that you have to finance your own schools from your own inadequate tax base at a grossly inflated tax rate while Beverly Hills can do the same thing at one-third the rate for two or three times the spending? Is that local control or is that the creation of privilege on the one hand and gross disadvantage on the other? The answer is obvious, and—most of all—the effect is the work of government which has created subagents with uniform responsibility but grossly different opportunities for carrying out that responsibility. I would suggest that local control is not promoted by the existing system but might very well be promoted by systems perfectly consistent with *Serrano*.

It is easy to see that *Serrano* would permit centralization of all decision making. That is, uniformity of spending by class of child from district to district throughout the state is one response to *Serrano*. It is a perfectly intelligible response, fair, and in many respects desirable. Many sensible people prefer this, even those who cherish a degree of variety, for even uniform financing systems can achieve a measure of curricular variety. For example, from a central fund suppose the state gave $1000 per child in the state of Oregon and then let the districts decide how to allocate that fund internally. A district might then either spend the money evenly or prefer one kind of curriculum which it would support with $1500, spending only $500 per pupil on another. It could spend $2000 on blind children and $750 on normal children. It could indulge local priorities supported by an equality of economic input from the state.

Now, on the other hand, you might very well feel that that's not a very good way of doing it. Districts have different problems. Some have children in larger numbers who are underachievers, and, if money means anything, then we ought to have extra money for the underachievers. So the state ought really not to say "one kid and one buck" but rather this kid two bucks and that kid three bucks, because pupils are different and have different needs. However, if the state provides the revenue to the district according to a standard of difference among children set by the legislature, but permits the district to spend it according to its own notions of priority, certain problems are created. It seems incongruous to give the district $3000 for a blind child and then have the district spread it over the whole system. Of course the state might set up a rigid control system over spending and require that the $3000 be spent on the blind or underachieving child whose presence generated its dispensation from the state. However, this has troublesome consequences in the case of minority children. If you choose to give extra money for disadvantaged children and insist that it be channeled to the disadvantaged child, you've created a kind of tracking. You may be separating that child from his majority peer and unconsciously and unintentionally promoting a form of racial or other minority segregation.

Can a decentralized system conform to the *Serrano* rule if districts can set their own overall level of spending? The answer is in the *Serrano* rule itself. Remember all it says is that the quality of public education may not be a function of wealth. Suppose that you kept the existing school district system with but one change—you made all districts equally wealthy and then liberated them to do what they chose with respect to taxing their own wealth. If you can imagine a system in which school districts are equally wealthy—in which they have an equal tax base on which to impose a locally chosen tax—you have imagined the system which conforms to the norm. You have imagined a system in which the quality of education is not a function of wealth but rather of locally chosen tax effort or commitment to education.

Now how would one go about doing that? Do you have to gerrymander all of the boundaries of all the districts so as to incorporate a little piece of a factory here and a little piece of hydro-electric unit there and make every district have an equal tax base? No, not at all, although that is one way of doing it, and that is a way of easing the other juggling that has to be done. Suppose the state said we will first supply the district with $600 per child from the state. But above that level if you want to add on that's all right, and here's the way you can add on: for every additional one of one percent (one mil) on your local property tax (you can use the income tax instead if you want and that would probably be better) you can spend an additional twenty five dollars. Notice it's **spend**; the imposition of the additional tax generates a specific addition in **spending** power. It doesn't matter what the tax raises. If the tax raises too much because the district is wealthier than $25,000 per pupil, then the extra is redistributed. Suppose, for example, you have a tax base of $30,000 per pupil and thus raise $30 for each mil that you tax your local property. Five dollars would then be redistributed through the system to the poorer districts. If you only raised $10 with each of those one mil increments, you would receive a subsidy of $15 per mil from the state per child. The state might put a maximum on the number of additional mils that any district could add. It might say, you can't spend over $1400 and thus you can't add more than $800. Whether a limit is imposed depends on what your predictions are on the cost of an open ended system. If the poorer districts generally chose the higher levels of taxation the necessary subsidy would become excessive. So you must have cost predictions in such systems. By the way, such systems giving equal economic capacity to decentralized units are called "power equalizing."

I would hope that if any state adopted that kind of system it would also add a third part which would take into account differences among children or differences among districts. After all, if you live out in the wide open spaces you're going to have to get the children to school somehow, and I don't think there's going to be a constitutional amendment against busing in the desert. So that you may have categorical aids of various kinds. The state could decide to add on to express the kinds of preferences that it might have or the kinds of cost differences that may exist.

Now once you have seen a decentralized system that is unaffected by wealth differences, it's quite possible to imagine any sort of decentralized system which is "power equalized." For example, one can think of a system in which families were the school districts, with each family power equalized to make its own choice of level of spending for its children's public education. This may be conceived as a "voucher" system in which families would commit various percentages of their income to education and be rewarded by larger or smaller subsidies according to their income. Let me give you an example. Think of a welfare mother in this kind of system who might spend $5 a year to send her child to a $500 school. You might make it possible for her to send her child to a $1500 a year school if she were willing to invest another $15. You and I using the same schools would probably pay the whole cost or something approaching the full cost because we're rich. It may sound a little eccentric. You may fear that it has all the disadvantages of voucher systems. I hope that some of you will be interested in the question period in talking about what one would have to do to a voucher system to make it really fair for minorities, for the poor, and so on.

Let me close with some description of the current status of the litigation and legislative response as I see them. Politically, it's quite opaque at the moment. Some of the legislatures are struggling with *Serrano* apparently with sincerity and vigor. Most, however, seem to be rather comatose on the subject waiting for some kind of stimulus from Washington or otherwise. The litigation, however, is coming to a head in two ways–both in the state courts under the state and federal constitutions and in the federal courts under the federal constitution alone. And that's a distinction to which I shall return very shortly. The *Serrano* case itself is unlikely to establish the national norm. It is back in the trial courts; there has never been a trial, as *Serrano* came up "on the pleadings." The court established the principle but in this form: if what you say is true this system is unconstitutional. Now go back and prove it; prove the facts that you have alleged. That's the stage at which the litigation finds itself. However, there's probably only one issue of fact in *Serrano*, if any, and that is the question of the relationship of the expenditure of money to the quality of education. There's a certain irony involved there in the defendants, the interested rich school districts, taking the position that money doesn't count. If they should win the case which is technically possible their argument may return to haunt them in their campaigns to pass tax referenda in years ahead.

The Texas litigation being in a three judge federal court was propelled directly by the appeal route to the United States Supreme Court. That case will be set on the calendar to be argued in the fall. There will no doubt be a great many **amicus** briefs. The Minnesota case which was decided in the fall by a single federal judge has been dismissed by the winning plaintiffs. The legislature there has passed a much more equitable structure, though it by no means approaches the requirements of the decree of the opinion in that case.

I should also mention to you another interesting case in the United States Supreme Court called *Johnson v. the New York State Education Department.* The *Johnson* case is a very peculiar case involving a New York fiscal refinement. High school students in New York receive free books, but whether grades one through six receive free books is up to the voters in the district. Some of the poorer districts have not voted to give free books. As a consequence in places like Hempstead, third graders are learning to read without books unless their parents can afford them. And so you have some children with books sitting next to others without books. The poor plaintiffs, represented by poverty lawyers in New York challenged the system under the equal protection clause, lost in the Federal District Court and in the United States Court of Appeals. The Supreme Court has now granted **certiorari** and will be hearing that case also in the fall. I suspect that the relationship between that case and the *Serrano* and *Rodriquez* cases will not go unnoticed. And I take it as a hopeful sign that the court has granted review of the New York case; they did not have to do so. Unlike the *Rodriquez* case this was a discretionary taking of the case by the Supreme Court. Where it will come out, nobody knows.

Now on the other prong of the judicial arm—the state constitutions—there is also hope. That is to say, even if the United States Supreme Court reverses *Rodriquez,* there is reason to think that some of the state courts under their own analogues to the equal protection clause will hold their state systems unconstitutional. The Michigan Supreme Court has accepted original jurisdiction of a case that is now being tried by a master appointed to take the evidence. That case will be argued in June and it is likely that the Michigan Supreme Court will be announcing its decision some time this summer. There is hope that Michigan will be the first to lock up this matter under its own constitution and, thereby, insulate it from federal review. It's always nicer to handle such matters close to home.

CAN *SERRANO v. PRIEST* BE ADOPTED IN OREGON?

Robert Winger

The California Supreme Court in *Serrano v. Priest*[1] held that a system of public school finance dependant upon local property values which produces disparities in expenditures and resulting educational opportunities is actionable under the equal protection clause of the United States Constitution and under the California Constitution.[2] The right to an education was recognized as a fundamental interest and the state system of finance may not discriminate between school districts on the basis of property wealth, particularly when no compelling state purpose necessitates such a system. The court required fiscal-neutrality in educational finance by holding that the quality of education may not be a function of wealth other than the wealth of the state as a whole.

The repercussions of this decision are still just beginning to be felt. At this juncture it might be useful to consider whether the *Serrano* rule could and, if so, whether it should be applied in Oregon. The former inquiry is factual; whether similar circumstances exist in Oregon as existed in California. The latter inquiry involves the propriety of the constitutional analysis and the potential impact of its application in Oregon. Only the former will be dealt with in this paper.

California and Oregon have similar constitutional provisions in this area. Both state constitutions include equal privileges and immunities clauses.[3] While California courts have interpreted its clause as "substantially the equivalent" of the equal protection clause of the federal Constitution,[4] Oregon courts have applied the same principles when evaluating challenges based on the equal protection clause of the United States Constitution and those based on the state equal privileges and immunities provision.[5]

In some legal circles it has been said that a *Serrano* ruling could be even more likely in Oregon because of the existence of some differing constitutional provisions. Reliance is placed on the inclusion of the word "uniform" in Oregon's provision for the establishment of public education and the absence of it in California's provision.[6] This reliance is misplaced since the Oregon Supreme Court has interpreted "uniform" in this context as related only to the system and not the means of obtaining the statewide system.[7]

The Oregon Constitution also requires tax laws to operate uniformily as does the California Constitution.[8] Early cases interpreted such provisions as necessitating uniformity only within the taxing units, ignoring Serrano-type discrimination between taxing districts.[9] However,one bone might have been thrown to "Serranoptimists" when the Oregon Supreme Court explained, "It is only where statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect...that the courts..." will interfere.[10] Perhaps such inequality exists today.

An analysis of the present system of financing public education in Oregon requires an examination of the mechanics and interactions of its four principal components.[11] Most districts receive revenues from (1) the residents within the school district, (2) the state, (3) the county, and (4) the intermediate education district.

Local Revenue

Disparities in educational offerings, reflected in variations in expenditures per pupil,[12] arise predominately from differences in school districts' local revenue raising abilities.[13] The ability of a district to finance education locally is a function of the property wealth per pupil of the district, and of the willingness of the residents to tax themselves for education.[14] In Oregon, disparities in district wealth per pupil exist in a ratio of 1 to 143.[15] Even if the districts with less than 100 pupils are excluded because of their inherent inefficiencies of scale,[16] the wealth per pupil ratio is 1 to 22.[17]

Available research also indicates that variations in expenditures per pupil are more related to disparities in school districts' wealth per pupil than to any variations in specific operating costs between districts.[18] Furthermore, studies conclude that property valuation is the most significant single factor affecting a district's expenditures per pupil.[19] Therefore, in light of these wealth disparities, wide disparities in per pupil expenditures are to be expected in Oregon.

The relatively poor districts may value education highly and tax themselves at rates three to four times those of rich districts, yet even with state aid these poor districts are unable to match the expenditures of the rich.[20] The average net operating cost per pupil for the poorest ten percent of the districts was $664 in 1969-70, while for the richest ten percent it was $1623.[21] Furthermore, the average tax rates that produced the revenue to finance these costs were 13.14 and 9.52 mils respectively.[22] The richest ten percent supported a program at a cost nearly twice the statewide average from only three quarters of the statewide average tax.[23] On the other hand, the poorest ten percent, taxing at nearly the average statewide tax, could produce only three quarters of the average statewide operating revenue.[24] As the costs of education continue to rise and other municipal services expand, voters are increasingly reluctant to approve additional or increased levies.[25] The poorer districts are the first to experience this problem.

State Revenue

Although the state has allowed local government to become the predominate source of educational revenue,[26] the state is still responsible for the operation of the entire system of finance.[27] Its programs aiding education, therefore, should be designed to counteract any of the inequalities that arise from variations in local revenue raising abilities.

The Basic School Support Fund is the primary source of state aid to public education.[28] The stated purposes of this aid program are "to equalize educational opportunity and conserve and improve" the standard of public education.[29] Implicit in these purposes, especially that of improving education, and in the method chosen to effectuate them, *i.e.*, monetary aid, is the state's recognition of the relationship between expenditures for education and the quality of education. In *Serrano*, for the purposes of the appeal, the demurrer of the defendants was viewed as admitting this relationship.[30] Proof of such a relationship in a trial of the alleged facts would be difficult but not necessarily impossible.[31] Certainly, variations in operating costs per pupil ranging from $190 to $6,880 or $535 to $2,450 when small school districts are excluded, must have some effect on the quality of education offered.[32]

How the stated purposes of school support interact and are effectuated by the manner of allocating funds is of prime importance here. Some standardized terminology would be useful for this analysis: to the extent that the program aids a poor district to overcome its poverty, the program can be categorized as **equalizing**; if it aids the rich districts and accentuates resource disparities, the program is **anti-equalizing**; if the program affects all districts equally, regardless of their relative wealth, the aid is **non-equalizing.**

Special Purpose Grants

Sixty percent of the transportation costs of a district expended two years prior to the year of apportionment must be distributed from the Basic School Support Fund in proportion to the statewide total of such costs.[33] To the extent that this aid program is an incentive for rich districts to increase their transportation expenditures, it is **anti-equalizing** since the poor district may find it difficult to supply adequate transportation facilities.[34] Of the three stated goals of the Basic School Support Program this allocation seems most related to the conservation and improvement of education, because it allows the districts to reallocate the money that would otherwise be spent on transportation. However, because this aid is for a relatively fixed cost and accounts for only about 8 percent of the Basic School Support Fund,[35] it is not of major importance.

An even smaller proportion of the Basic Fund, 1.79% of the remaining fund, is allocated to enrollment growth, and is distributed to the districts experiencing growth in the proportion that a district's increase in pupils bears to the total statewide increase.[36] Since growth is substantially independent of a district's relative wealth, any effect that this aid has on the equalization of educational opportunity appears to be coincidental. Although it had its origins during a time when many districts were rapidly growing and population data was not adequate for budgetary planning, this growth factor has been considered an unnecessary complication in the state's aid program.[37]

Foundation Program

A majority of the Basic School Support Fund is distributed under a foundation program.[38] Under this program, all districts receive flat grants based upon the district's weighted resident pupils[39] and some districts receive equalization aid because of their relative inability to locally support a certain minimum level of education set by the state.[40] While the national trend of states operating similar foundation programs is to increase the equalization portion,[41] recent legislation in Oregon has increased the flat grant portion from a fixed 81.5% of the remaining fund (after deductions for growth and transportation) to the remaining fund minus the amount allocated as equalization aid in 1970-71.[42] The proportion of state aid that is equalization aid, already below the national average,[43] will steadily decrease as the total state aid increases. Therefore, it seems that the primary result of state aid to education in Oregon is to supplement local revenues for education, and not to equalize educational opportunities.

There is also a question concerning the effect of flat grants under the formula used in apportioning the foundation program. However, before this question can be fully answered it is necessary to consider the operations of the component parts of the formula. The effect of a flat grant operating alone is most often considered to be **non-equalizing** because all districts receive the same amount per pupil.[44] A flat grant can be **equalizing** only to the extent that the source of the funds for the grant is a progressive tax[45] and that it can be said that low income families live in poor districts.[46]

Equalization aid is an attempt to assist poor districts in attaining a minimum educational program. All districts levying a specified tax[47] are guaranteed at least the minimum per pupil revenue level designated by the legislature.[48] For example, suppose the minimum level is $600 per pupil, the required district millage is 10, and district (A) has a true cash valuation per pupil of $20,000 while district (B) has a valuation per pupil of $60,000. If both districts taxed at the required rate, district (A) would raise $200 and receive $400 from the state while district (B) would raise $600 locally and receive no state equalization aid.

Such a plan would be fully **equalizing** only if no district could tax at a rate higher than the required rate and the minimum guaranteed level were equal to the revenue which would be raised by the richest district at the required rate.[49] As long as rich districts can tax above this rate or accumulate more than the guaranteed level at the required rate, wealth discrimination will continue.[50] In Oregon, over sixty percent of the school districts tax at rates above the required equalization rate.[51] The richest district, if it taxed at that rate, would produce thirty times the guaranteed level without any state aid.[52] The average actual tax rate is twenty percent above the required rate.[53] Thus it seems equalization aid falls far short of fully equalizing educational opportunities and removing wealth discrimination.

The situation in Oregon is more complex than in states that utilize flat grants and equalization aid independently. In Oregon, the flat grant is included with local revenues that would be generated by the tax levy at the required rate and the sum is then equalized up to the guaranteed minimum level.[54] It makes no difference to a poor district whether or not flat grants exist because a specific amount of funds is guaranteed regardless of whether part are called flat grants. The rich district, on the other hand, receives no equalization aid but does get a flat grant. The flat grant is **anti-equalizing** to the extent that it increases a rich district's revenues beyond the guaranteed level since the poor districts receive aid only up to that level.[55]

In 1969-1970, Oregon guaranteed a level of $483.53 per pupil provided a district taxed at 11.278420 mils.[56] The flat grant per pupil was $130.95.[57] The distribution and effect of the aid from the foundation program of the Basic School Support Fund is presented in Figure 1. Districts that would have produced less than $352.58 per pupil (the difference between the guaranteed level of support and the flat grant per pupil) at the required rate (districts poorer than A) received both equalization aid and flat grants. For districts producing more than $352.58 per pupil at the required rate (districts richer than A) but less than $483.53 (districts poorer than B) a portion of the flat grant is **anti-equalizing.** All flat grants received by districts richer than B are **anti-equalizing.** The portion of the flat grant money that is **anti-equalizing** is shown in Figure 1 above the solid line. Over $19 million, thirty percent of the flat grant aid, was apportioned in such an **anti-equalizing** manner.[58] The choice of the formula used in allocating funds directly results in discrimination against the poor districts and contravenes one of the stated purposes of the state program, that of equalizing educational opportunity.

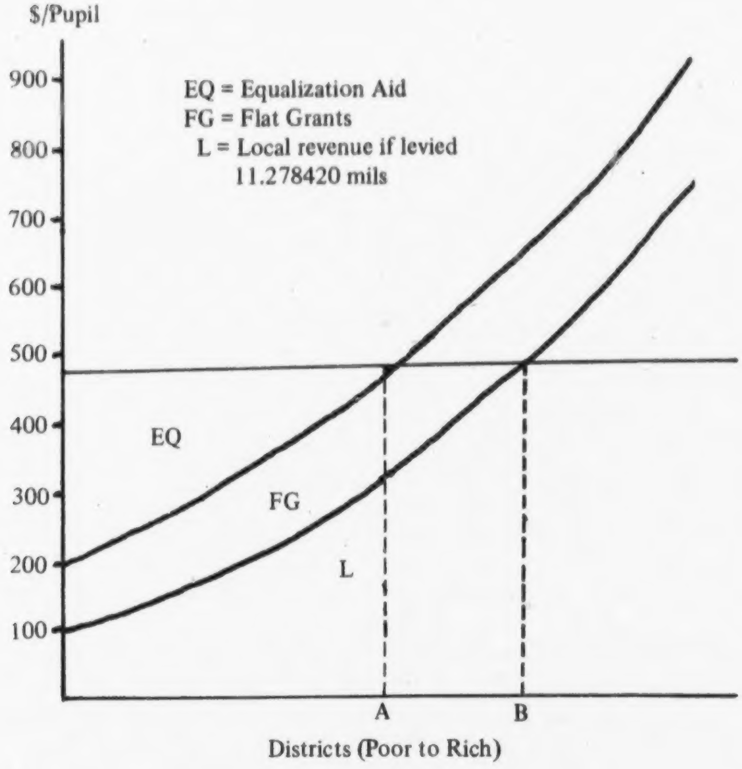


FIGURE 1

County and I.E.D. Revenue

Each county in Oregon is required to levy a property tax that will produce a fund equal to the lesser of the amount levied in the year 1965-1966 or $10.00 per census child between the ages of 4 and 20 years.[60] To this County School Fund is added other monies received by the county for educational purposes, *e.g.*, federal forest rental and timber sales.[61] Out of this fund each district receives $100 plus an amount apportioned according to the number of children within those ages that resided within the district the previous fiscal year.[62] The fund serves to equalize expenditure disparities within a county in much the same manner as the intermediate education district.

Most counties in Oregon have established intermediate education districts in an effort to equalize disparities within a county by forcing rich school districts to aid the poorer districts within the I.E.D.[63] The most common type of I.E.D. levies a property tax designed to produce up to 50 percent of the total school districts' operating levies in the preceding year.[64] The revenue is then distributed on the basis of the resident average daily membership of each district,[65] *i.e.*, a flat grant per unweighted pupil, and the total local levy extended is adjusted to account for this additional revenue.[66]

This procedure does not necessarily minimize wealth disparities. Even if the levy was distributed in a fully equalizing manner, only approximately 50 percent of the expenditures could be equalized.[67] In Lane County, for example, only 6.1 percent of the I.E.D. budget was distributed in such a manner that districts received more than they paid.[68] Furthermore, whether a district pays or receives more is not determined by its relative wealth per pupil. The eighth and tenth poorest districts of the sixteen in Lane's I.E.D. paid more to the I.E.D. in tax revenues than they received back, while the sixth and eighth richest districts received back more money than they contributed.[69] Additionally, the levy often adversely affects the state's equalization aid.[70] For example, two of the districts within Lane's I.E.D. that received more money from the I.E.D. than they contributed were not entitled to Basic School Support equalization aid in 1969-1970.

Harney, Grant, Wallowa, and Wheeler counties operate another type of intermediate education district.[71] In each of these counties, the distribution of the I.E.D. levy is based not on the average daily membership of each district but on the percentage that each school district's tax levy bears to the total levies of the districts within the I.E.D.[72] By completely ignoring the incidence of pupils in the collection and distribution of the funds, the effect of this system is more irrational than the usual type of I.E.D.

Four counties[73] operate as county units with a county school board setting the local levy in support of schools for the entire county and distributing the revenue as flat grants among the districts within the county.[74] Two of these counties, Klamath and Josephine, allow some districts to levy taxes independent of the county levy,[75] but since most of the local revenue for schools comes from the entire county no intermediate education districts have been formed in these four counties. The effect of the county unit system is to remove wealth as a factor in determining the educational expenditures of the included districts.

Summary of Empirical Study

Oregon does not distribute the benefits of education equally. In spite of the abundance and complexity of revenue producing programs, the quality of education a child receives is largely determined by the wealth of the district in which he happens to live. State enrollment growth and transportation aid programs are at best **non-equalizing.** The majority of state funds are distributed as flat grants that are substantially **anti-equalizing.** Only the equalization aid program has the potential of lessening the disparities in revenue raising abilities among districts in the state. However, the declining size of this program demonstrates that elimination of wealth discrimination in education is not a high state priority. The state has also provided for county and I.E.D. programs that in practice do not always realize the goals they were intended to accomplish, and often conflict with the goals of state aid programs. The state system of financing public education, therefore, can be said at best to condone, if not perpetuate, local wealth discrimination and unequal educational opportunities.

Therefore, from this analysis of the constitutional provisions and the statutes and their effects, it seems apparent that Oregon is ripe for the adoption of the *Serrano* rule.

Footnotes

[1] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[2] U.S. Const. amend. XIV, § 1, Cal. Const. art. I, §§11, 21. There was no final adjudication of the parties' rights in *Serrano* since the appeal arose on a demurrer. *Accord, Van Dusartz v. Hatfield*, Civil 243 No. 3-71, 10 & n. 14 (D. Minn., Oct. 12, 1971); *See* Schoettle, "The Equal Protection Clause in Public Education" 71 *Colum. L. Rev.* 1355, 1404 (1971). *Contra, Rodriquez v. San Antonio Independant School District*, Civil No 337 F. Supp 280 (W.O. Texas, 1971).

[3] Compare *Cal. Const.* art. I, § 21 which provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen or class of citizens, be granted privileges or immunities which upon the same terms shall not be granted to all citizens" with *Or. Const.* art. I § 20 which provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[4] *Serrano v. Priest, supra,* n. 11.

[5] *Plummer v. Drake,* 212 Or. 430, 320 P.2d 245 (1958).

[6] Compare *Or. Const.* art. VIII, § 3 which provides: "The legislative Assembly shall provide by law for the establishment of a uniform and general system of common schools," with *Cal. Const.* art. IX, § 5 which provides: "The legislative shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

[7] *School Dist. v. American Surety Co.,* 129 Or. 248, 275 P. 917 (1929).

[8] Compare *Or. Const.* art. IX, § 1 which provides: "All taxes shall be levied and collected under general laws operating uniformly throughout the State," with *Cal. Const.* art. I § 11 which provides: "All laws of a general nature shall have a uniform operation."

[9] *City of East Portland v. County of Multnomah,* 6 Or. 62 (1876).

[10] *Johnson v. Jackson County,* 68 Or. 432, 436, 136 P. 874, 875 (1913).

[11] Federal revenue is not considered in this comment. Such money is relatively insignificant and typically in the forms of special purpose aid. In 1969-1970 only 6% of the operating revenue for public education came from federal sources. Research Division National Education Association, *Rankings of the States,* 49 (1971).

[12] The term "pupil" is used throughout this note as a substitute for weighted resident pupils as defined in ORS § 327.006 (10) (1971). Weighted figures are used due to the need for consistency and simplicity in analysis and comparisons. The weighting of resident pupils is an attempt to account for the differences in high school and elementary educational costs. D. Parnell, *Apportionment of the Basic School Support Fund for the Year Ending June 30, 1970* (1970) (hereafter cited as D. Parnell). The weighting factor assigned a high school student is 1.3. *ORS* § 327.006 (10) (1971). However, the higher cost of high school education has been said to be over-exaggerated and declining in importance in Oregon. Legislative Fiscal Comm., *A Program for Revision of Intergovernmental Finance in Oregon* 76 (1966) (hereafter cited as Legislative Fiscal Comm.). The proper weighting factor in 1965-1966 would have been only 1.14. *Id.*

[13] In Oregon about sixty-six percent of the revenue for public education comes from local property taxation. Legislative Fiscal Comm., *supra* note 3, at 69; See also A. Wise, *Rich Schools Poor Schools* XI (1968).

[14] *Serrano v. Priest, supra*

[15] The poorest district in the state, Delena in Columbia County, has an assessed true cash valuation per pupil of $8711.07 whereas the richest district, Flora in Wallowa County, has a true cash value per pupil of $124,844.00 (143 times that of Delena). R. Winger, *Special Report – School District Rankings for School Year 1969-1970,* Oct. 12, 1971 (unpublished report in Univ. Or. Law Center Library) [hereinafter cited as R. Winger].

[16] Efficiencies of scale refer to the minimum size a district must be to operate efficiently. The exclusion of districts with less than 100 pupils is not meant to imply that larger districts are actually operating efficiently. Certain relatively fixed costs, such as principals' salaries, make up a greater proportion of a small district's budget than of a large district's. The exclusion of these very small districts is also consistent with the legislative recognition of their special problems implicit in ORS § 327.075 (2) (1971), (the small school correction provision).

[17] Nearly 30% of the districts in the state are thereby excluded. The richest district under these circumstances is Helix in Umatilla County with an assessed valuation per pupil of $187,728.50 while the poorest district is still Delena in Columbia County. R. Winger, *supra* note 6.

[18] W. Briley, "Variations Between School District Revenue and Financial Ability," 4 *National Educational Finance Project* 49, 51(1971).

[19] S. Weiss, *Existing Disparities in Public School Finance and Proposals for Reform* (1970); H. James, J. Thomas, & H. Dyck, *Wealth, Expenditures, and Decision-Making for Education* (1963).

[20] R. Winger, *supra* note 6.

[21] *Id.*

[22] *Id.*

[23] The average cost statewide was $862, and the average tax rate was 13.62 mils. *Id.*

[24] *Id.*

[25] Legislative Fiscal Comm., *supra* note 3, at 56.

[26] Legislative Fiscal Comm., *supra* note 3, at 69.

[27] *Or. Const.* art. VIII, § 3 provides: "The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common Schools."

[28] Legislative Fiscal Comm., *supra* note 3, at 70-71; W. Bade, *Oregon Tax Primer* 14 (1970).

[29] ORS § 327.010 (1971).

[30] 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601, n. 16 (1971).

[31] *Id.; Rodriquez v. San Antonio Independant School District,* Civil No. 68-175-SA (W. D. Tex., Dec. 23, 1971). Research done by the Michigan Dept. of Education shows direct correlation between a district's annual expenditures per pupil and class size, special classes and programs, teacher preparation, full time principals, counseling services, research and testing, science labs and library facilities. J. Thomas, *School Finance and Educational Opportunity in Michigan* 20 (1968); J. Solarde, S. White, "Intrastate Inequalities in Public Education," 1970 *Wis. L. R.* 7, 10. The relationship between such input factors and output quality was held to be sufficiently direct in *Robinson v. Cahill,* No. L-18704-69 (Super. Ct. N.J., Hudson County, Jan. 19, 1972).

[32] R. Winger, *supra* note 6.

[33] ORS § 327.035 (1971).

[34] J. Coons, W. Clune, & S. Sugarman, *Private Wealth and Public Education* 58-59 (1970) [hereinafter cited as J. Coons].

[35] D. Parnell, *supra* note 3.

[36] ORS § 327.042 (1971).

[37] Legislative Fiscal Comm., *supra* note 3, at 75.

[38] D. Parnell, *supra* note 3.

[39] *See* note 3 *supra.*

[40] D. Parnell, *supra* note 3.

[41] K. Alexander, O. Hamilton & D. Forth, "Classification of State School Funds," 4 *National Educational Finance Project* 29, 31 (1971).

[42] ORS § 327.059 (1971).

[43] Oregon ranked 34th. R. Johns & R. Salmon, "The Financial Equalization of Public School Support Programs in the United States for the School Year, 1968-1969," 4 *National Educational Finance Project* 119, 137 (1971).

[44] J. Coons, *supra* note 25, at 54.

[45] J. Coons, *supra* note 25, at 55-56.

[46] C. Benson, "Economic Analysis of Institutional Alternatives for Providing Education" 2 *National Educational Finance Project* 121, 127 (1970).

[47] Although a local effort is required of districts, receipt of a district's share of equalization aid is not conditioned upon the levy of the required rate. If a district which would qualify for such aid chooses a lesser rate, the equalization money will still be distributed but the district will not be able to attain the minimum revenue level.

[48] D. Parnell, *supra* note 3.

[49] J. Coons, *supra* note 25, at 65, 71.

[50] *Id.*

[51] R. Winger, *supra* note 6.

[52] *Id.*

[53] *Id.*

[54] D. Parnell, *supra* note 3.

[55] J. Coons, *supra* note 25, at 112.

[56] D. Parnell, *supra* note 3.

[57] *Id.*

[58] R. Winger, *supra* note 6.

[59] This graph is only an approximation of the 1969-1970 data. R. Winger, *supra* note 6.

[60] ORS § 328.005 (1971).

[61] ORS § 294.060 (1971). The uneven incidence of such forest revenues increases the offering disparities between districts of different counties and is *anti-equalizing* on a statewide basis.

[62] ORS § 328.015 (1971).

[63] Legislative Fiscal Comm., *supra* note 3, at 70.

[64] *Id.* at 77.

[65] ORS § 334.290, 327.006 (2), (7) (1971).

[66] ORS § 334.300 (1971).

[67] This is a result of the limits set on the size of the I.E.D. budget.

[68] The figures were obtained from the Lane Intermediate Education District for the 1969-1970 Equalization Levy and Apportionment.

[69] *Id.*; R. Winger, *supra* note 6.

[70] Legislative Fiscal Comm., *supra* note 3, at 77.

[71] ORS § 334.350 (1971).

[72] ORS § 334.400 (1971).

[73] Crook, Josephine, Klamath & Lincoln Counties, D. Parnell, *supra* note 3.

[74] ORS § 333.370 (1971).

[75] Legislative Fiscal Comm., *supra* note 3, at 70.

THE POOR VIEW SERRANO

Laird Kirkpatrick

Serrano v. Priest originated as a lawsuit on behalf of poor children. The *Serrano* case was instituted by poverty law attorneys from the Western Center on Law and Poverty in Los Angeles, and many of the *Serrano* type lawsuits filed in other states have been brought by Legal Aid attorneys. The decision has been heralded as one of the most significant cases on behalf of the poor ever decided, a case that could break down the inequities in existing school finance systems and make possible equal educational opportunity for all. Yet in many geographical areas, advocates for the poor are now seriously questioning whether *Serrano* will contribute to the goal of equal educational opportunity for the poor. The Multnomah County Legal Services Program last fall studied the possibility of instituting a *Serrano* type lawsuit in Oregon. After careful consideration, it concluded that in Oregon a *Serrano* type decision would not necessarily be in the interests of the poor, especially in Multnomah County where the state's largest concentration of the poor reside.

In assessing the impact of *Serrano* upon the poor, an important fact must be kept in mind – the poor that are benefited by *Serrano* are poor **school districts** and not necessarily poor **persons**. Poor school districts can consist of rich persons. Rich school districts can consist of poor persons. This is because the wealth of a school district is measured by the taxable value of property per pupil, rather than by the average wealth of its residents. A school district can have a high value of property per pupil, and therefore be considered wealthy, even though the residents in that school district have a very low average income.

The extent to which *Serrano* benefits poor children, as opposed to poor school districts, depends almost entirely on the extent to which poor children reside in poor school districts. Many persons have assumed, without adequate statistical information, that there was a strong correlation between the wealth of a school district and the wealth of the residents in that school district. They assumed the richest school districts would be in wealthy suburbs and the poorest school districts in the central city. This is true in some states.

In Oregon, however, poor children are not concentrated in the poor school districts. To a large extent, this is because Portland School District No. 1, which is by far the largest school district in the state (with almost 70,000 pupils)[1] and which contains by far the largest number of poor children (almost 14,000),[2] is a rich school district. School District No. 1 has more poor children than every other district in the state has children, with the exception of three.[3] Yet Portland School District No.1 is richer than the school districts in Lake Oswego, Beaverton, and virtually all the surrounding suburbs, even though wealthier persons tend to reside in those suburbs.

Portland School District No. 1 has $54,000 of taxable property per pupil, which is well above the state average of $41,000 per pupil.[4] Lake Oswego School District has only $37,000 per pupil.[5] The reason for the comparative wealth of Portland School District No. 1 is the industrial and commercial property concentrated in the city.

Even on a statewide basis in Oregon, there appear to be as many, if not more, poor children in rich school districts as in poor school districts.[6] However, more statistical information on this point is necessary.

The irony of a *Serrano* type law suit in Oregon is that the whole purpose of *Serrano* was to provide poor children with equal educational opportunity. Instead, the theory of *Serrano* applied to Oregon favors the children of the wealthy in the Portland suburbs at the expense of the children of the poor in the Portland core area. A poor child in Portland has numerous educational disadvantages as compared to a child from a wealthy family in the suburbs. However, one of the few advantages a poor child in Portland School District No. 1 does have is greater taxable wealth per pupil in his school district. The theory of *Serrano* rather than helping that poor child, would take away this one educational advantage.

However, it is much too early to assess the ultimate impact of a *Serrano* type decision upon the poor in Oregon. It depends entirely upon the legislative response to such a ruling and upon what system of school finance replaces the existing system.

The poor have cause to be concerned, however, by some of the options or "models" that are being proposed. The option that would be the most prejudicial to the children of the poor is the decentralized model, where the state provides only a minimal amount to each student and the local school district determines the level of expenditure by how high it sets its tax rate. If the Oregon Supreme Court adopts the *Serrano* rule, there would have to be what Professor Coons calls "power equalizing" so that each school district in the decentralized system would be able to raise the same amount of money for education by the same tax rate. On its face, this seems eminently fair. Each district could set its own level of educational expenditure and each district could raise the same amount for education by the same rate of tax. However, I think such a system would inherently discriminate against the poor for several reasons.

First, the key to such a decentralized system is "effort" *i.e.*, which district is willing to pay higher school taxes. However, this system ignores the many factors that influence how much "effort" a district is able to make. If the average income per family is $4,000 a year in one school district, it is much harder for that district to be able to pay a higher rate of school taxes than for a district that has an average family income of $20,000 per year. If the residents of a school district have a high income, they can afford to devote a larger proportion of their income for school taxes in order to provide better education for their children. Low income persons could not afford to do so.

Another factor that distorts the "effort" formula is municipal overburden. Municipal overburden means the amount of non-school property taxes in a given district. In Portland, for example, non-school property taxes for city and county purposes are much higher than in most school districts. This is illustrated by the fact that only 48 per cent of the Portland property tax dollar goes to schools, whereas the statewide average is for 70 per cent of the property tax dollar to go to schools.[7] If a school district is paying twice as much in non-school property taxes as another district, it is going to be more difficult to raise the property tax for schools in that district. The Portland School District's school budget was rejected three times by the voters in the last year, and Portland is now operating schools that are labeled "substandard" by the state, because they are being required to close 20 days early this year because of lack of funds. If a decentralized, power equalized system were adopted in response to ***Serrano***, it would be even more difficult to get Portland voters to approve school budgets, because under such a system it would require an even higher tax rate to raise a given amount of revenue than is required now.

Still another factor that shows the inequity of a decentralized system where school districts set their own level of spending is the fact that some districts, such as Portland, contain a disproportionately large number of elderly persons, single persons, and other persons without children who are likely to vote against increased property taxes for education. The suburbs, on the other hand, have a higher proportion of families with young children, and such persons are the voters most likely to support increased school taxes. Should children in certain school districts be penalized by the fact that the voters in their district, for a variety of reasons, are unwilling to pay more for schools than the state required minimum? Is it fair to deprive a school child of the same quality of education that is being provided other children in the state merely because his community does not place as high a priority on education as other communities in the state? The Oregon constitution declares education to be a state responsibility. If this is true, it would seem that the state has an obligation to guarantee equal educational opportunity to all children in the state, regardless of the values and priorities of their local school district.

Although the decentralized, local-option model would be the most disadvantageous to the poor, the model of equal educational expenditure per pupil on a statewide basis would also be inequitable to the poor. A rigid system of equal expenditure per student is inherently unequal. School children differ in educational needs. If a student is blind, or otherwise handicapped, or educationally disadvantaged, he is going to require greater educational expenditure than a normal student. To deny him the additional expenditure he needs in order to obtain an education is to deny him equal educational opportunity.

Another difficulty with complete uniformity in per pupil expenditure throughout the state is that educational costs are higher in certain school districts. The costs of construction, maintenance, insurance, transportation, and other educational expenses vary from area to area in the state.

Finally, if per pupil expenditure were equal throughout the state, presumably teachers' salaries would have to be uniform in all districts. If teachers' salaries were uniform, it is unlikely that schools in poor areas, especially in the core area of Portland, would be able to compete for the most qualified teachers with the pleasant, peaceful suburbs. Again, the children of the poor would be denied equal educational opportunity.

It is important to recognize that the *Serrano* case did not require equal expenditure per pupil. All *Serrano* said was the state could not allocate its educational resources on the basis of the amount of real estate per pupil in each school district. The court held that the amount of real estate per pupil was not a factor rationally related to educational purposes. It is entirely proper, however, for the state to consider factors that are rationally related to education, such as special needs of certain children, and to allocate money accordingly. From the point of view of the poor, the most desirable educational system would be a centralized model where the special educational needs of children are recognized and funds allocated in a manner that truly makes possible equal educational opportunity for all.

The public reaction to *Serrano* has been disturbing, because it has focused so little on the goal of equal educational opportunity. Poor children seem to have become the forgotten parties of the *Serrano* case. In Oregon, *Serrano* has become a taxpayer's lawsuit rather than a school children's lawsuit. Some persons view *Serrano* solely as an opportunity to shift their property tax burden to someone else.

Those who read *Serrano* as pertaining exclusively to tax dollars, and not to the right of poor children to equal educational opportunity, may be misreading the meaning of *Serrano*. They may also be misreading the Fourteenth Amendment. *Serrano* is only one of a series of lawsuits extending over many years that have attempted to apply the equal protection clause of the Fourteenth Amendment to state systems of public education. The fundamental constitutional question is whether a state violates the equal protection clause when it provides superior educational opportunities to some of its school children and inferior educational opportunities to other school children, usually the children of the poor. In *Serrano*, the court was able to avoid this broader question and limit itself to a narrower, more judicially manageable issue. However, the court in *Serrano* clearly intended that its ruling would lead to greater educational opportunity for the children of the poor.

Education has an overriding importance to the poor, because education is the best and usually the only means available to the children of the poor to break the poverty cycle. Education is the key to almost all rewards our society has to offer. Yet, in Oregon, as in virtually every other state, the children of the poor, and even many of the non-poor, have not been provided with equal educational opportunity.

In responding to *Serrano*, Oregon has a tremendous opportunity. It can provide not only more equity in taxation, but more equality in education. Hopefully, in restructuring Oregon's system of school financing, the legislature will accord at least as high a priority to the rights of school children to equal educational opportunity as to the rights of tax-payers to fair taxation.

FOOTNOTES

[1] *1970-71 Resident Average Daily Membership, True Cash Value, and Local Millage Levy by Size and Types of Districts;* Oregon Board of Education.

[2] *Distribution of Children from Low Income Families in Oregon for Determining Local School District Maximum Basic Grants under Title I, ESEA for Fiscal Year 1972.* Oregon Board of Education, July 1, 1971.

[3] Salem 24J (22,459), Eugene 4J (21,023), Beaverton 48J (18,752). The majority of Oregon school districts have less than 1,000 students. *1970-71 Resident Average Daily Membership, True Cash Value, and Local Millage Levy by Size and Types of Districts,* Oregon Board of Education.

[4] Id.

[5] Id.

[6] This conclusion results from a comparison of the number of low income children for purposes of Title I (see footnote 2) classified by the wealth of their school district. The 1970 census information on family wealth will be available shortly and should lead to a more accurate determination of how many poor children in Oregon reside in poor school districts.

[7] *Summary of Assessment and Tax Rolls for 1969-70 fiscal year and 1968-69 Property Tax Collections,* p. 29, Department of Revenue, State of Oregon, January, 1970.

THE CONSTITUTIONAL DOCTRINE OF SERRANO v. PRIEST: SOME RESERVATIONS AND CAVEATS

David B. Frohnmayer

I. Introduction

Few attorneys or law professors can ever claim in their lifetimes to have the same impact on the nation that Professor Coons has achieved, not only by virtue of his articles and books, but in the landmark case of *Serrano v. Priest*[1] which he argued in the California Supreme Court. He and his colleagues have almost single-handedly forced a healthy and long overdue national debate on issues of educational finance. It is a genuine tribute to his scholarship that any proper critique should be of book length to do justice to the quality, intricacy, and insight of his analysis.

Serrano v. Priest has swept the country, and has inspired the spread of a messianic theology of equal protectionism with its own litany and incantations: "suspect classifications," "fundamentality," "compelling interests," and "super-rationality." Nonetheless it may be time for a second round of examination, and an appropriate moment to heed voices of caution. The issue should be joined to provide this new theology, if not with a devil's advocate, at least with its doubting Thomas.

By asking for my remarks to be taken as a plea for open discussion, I hope to escape the charge of dog-in-the-mangerism, and the accusation that Professor Coons has not been accorded the Oregon hospitality that he has every right to expect. The odds seem, in any event, to be stacked securely in his favor. The list of jurisdictions adopting *Serrano* grows longer each month. I feel a little like those who stood at Kitty Hawk some 70 years ago, looked at that strange machine, and argued to the end: "Orville, it won't fly." But I'm not sure it **will** fly and, unless some important questions are answered, it is not clear whether it **should.**

Some initial caveats are appropriate. I do not argue that the present disparities in the system for financing elementary and secondary education in this state are fair or represent sound policy. These disparities and the inequities they demonstrate are clear. I do not appear to defend the property tax; like the plague, few will sing requiems for its passing. The property tax falls inequitably on different groups, and it is often counterproductive in terms of the policy choices that it compels in agriculture, industrial location and land-use planning. This paper is not an argument against reform. In fact, the legislature should have assumed this role long ago, and without depending upon the judicial branch to force attention to the issue. In fairness, of course, it should be noted that state constitutional and statutory limitations, particularly the referendum, have crippled major tax reform efforts in recent decades. Finally, it should not be necessary to add that I support the idea of excellence for elementary and secondary education in the state, and the price tag necessary to achieve it.

My purpose is simply to put this proposition: if constitutionalism means anything at all, it should mean that there is a right way and a wrong way for the governmental institutions of a society to conduct business; and misuse of the equal protection clause of the United States Constitution to mandate state school financing changes may well be the wrong way.

The major proposition may be subdivided into three subsidiary arguments. The first is that the *Serrano* Court admits, and Professor Coons in his paper has agreed that the result in *Serrano* is not compelled by a process of deductive logic from existing decisions of the United States Supreme Court. *Serrano* clearly is an extension of doctrine, not merely an application of it. It should follow that a court reaching for a result has a greater obligation to survey the potential empirical consequences of its exercise in judicial creativity than has a court compelled more convincingly by doctrine and dogma.

The second sub-proposition is that a rigid Fourteenth Amendment mandate forecloses in real ways policy choices among alternatives which might have been made by governmental units at the state and local levels. Consider Governor McCall's statement, in announcing his tax reform proposal–that it calls for smaller sums than might be needed for "strict compliance with the Serrano concept." Unfortunately, as is the case with pregnancy, there is no such thing as being just a little bit unconstitutional. The fault, however, if any is to be assigned, surely lies not with the Governor, but with rigid Fourteenth Amendment constraints on our governmental choices. A decision based on state legislation or a state constitution would permit significant legislative action or constitutional amendment to address the problem at the state level. A federal constitutional ruling forever forecloses those locally responsive avenues for political choice.

Third, it should be clear that this is no academician's quibble over abstract technicalities in constitutional doctrine. Particularly in light of renewed interest in governmental reform, and in concepts such as decentralization, local participation, and the revitalization of community civic life, we should be cautious about casting results in constitutional doctrine when the effect may well be to remove decision-making power to the higher levels of state, and most probably national government. *Serrano* decisions clearly have dramatic implications: implications for distribution of our society's business as between legislatures and courts; and implications for the effective levels of governmental decision-making at which important political choices are made, and ultimately, from which policy controls are imposed. In spite of assertions to the contrary, it is very difficult to find any instance in our nation's history in which the entity paying the piper did not end up calling the tune.

II. Serrano in Oregon

Robert Winger has set forth a very complete and persuasive analysis of the Oregon school financing structure in light of the findings and conclusions of *Serrano*. The state constitutional and statutory structure of Oregon is similar to the state of California, the factual disparities in district tax base and per pupil expenditure are also similar, and the attempted equalizing role of state educational expenditures is even less significant than in California. In brief, if Oregon courts adopt the *Serrano* equal protection rationale, there would seem to be little question but that plaintiffs would prevail in the merits.

There may, of course, be some room for legal maneuver. The California court case has not yet been tried on the rather narrowly circumscribed issue of whether the varying school district dollar inputs and expenditures on education have a tangible relationship to variations in educational quality among the districts. This has been a matter of considerable dispute ever since the massive 1966 Coleman Report[2] documented the apparent shortcomings of a compensatory education program limited to school hours alone. However, at least one case has already decided the issue on the merits. The New Jersey court in *Robinson v. Cahill*[3] reportedly received 150,000 pages of testimony, and, in an embarrassingly partisan opinion (one exceeding 80 pages and citing such eminent legal authority as Kurt Vonnegut's *Slaughterhouse Five* and T. S. Eliot's *The Hollow Men* as well as numerous sociological studies) found that there was indeed such a relationship. Although the temptation to demagogy in criticizing such decisions is irresistible, this process exemplifies the difficulties of court adjudication and, parenthetically, readily suggests the superior forum, as between legislatures and courts, for deciding such complex issues of expert opinion, factual analysis and value preference.

It is also conceivable that the trial of fact in a *Serrano* type case could establish that variations of cost input are related to quality in ways that do not establish unconstitutionally discriminatory variations as among districts. Variations in money input are related to a number of matters apart from educational quality in the classroom—transportation and busing expenses vary significantly throughout the state as do the numbers of pupils requesting higher cost vocational education. Class size and the ability to capitalize on economies of scale, the degree of high cost compensatory education programs, capital building costs, land acquisition and labor costs all affect expenditure levels. Undoubtedly, therefore, the rough equation of simple dollar input to educational quality could be seriously misleading. All this having been said, it is still a fairly obvious long-shot that defendants could show that the cost-quality relationship which *Serrano* purports to establish is not true as a matter of fact.

Even if the Oregon courts propose a *Serrano* result, the result could easily be established on the preferable ground of state constitutional provisions. But, in spite of these alternative possibilities, if *Serrano* is to be defeated or upheld in Oregon, the decision will probably rest on the persuasiveness to the Oregon courts of the federal equal protection argument. Before examining that argument and some of its central difficulties, it is useful to clarify those things which *Serrano* decided, and those which it did not.

III. The Serrano Decision: What Did It Decide?

First, *Serrano* did not abolish the property tax; nor did it lower it. One legislative consequence for some districts may well be increased property taxes; a strong likelihood is simply a shift of the taxing authority to a statewide property tax. *Serrano*, therefore, does not preclude use of property tax revenues, at least under appropriate circumstances, for schooling.

Second, *Serrano* does not reduce school district expenditures. Since it may well necessitate some kind of "leveling up" of some districts, it probably means increased aggregate school expenditures.

Third, as Professor Coons quite clearly stated, *Serrano* has nothing to do with the **individual** poverty of particular school children; nor does it have anything to do with the wealth of individual parents. Even the wealthy parent residing in a school district that spends more than the average amount on pupils can complain on the basis that his tax rate to achieve that expenditure level might be higher.

Fourth, and finally, *Serrano* (though the language of the opinion is not entirely clear) does not establish the constitutional mandate for equal per-pupil expenditures.[4]

There are various formulations of the precise proposition which *Serrano does* purport to establish; and it is worthwhile to state several of them. Professor Coons stated in his paper, "All that is forbidden is employment of units with similar tasks but different capacity to spend." Alternatively, he has stated: "Residence should not effect tax resources available for children's education." The courts have put it as follows: "The quality of public education may not be a function of wealth other than the wealth of the state as a whole." Or, "The state is required to be fiscally neutral." One must, of course, question whether the last formulation–the test of "fiscal neutrality"–is any clearer, is any more judicially manageable, contains any more precise standards for judicial evaluation and for the formulation of court-ordered relief than the talisman of "educational needs" which the United States Supreme Court seems already to have rejected as unworkable.[5] If equal per pupil expenditure is not necessary, what is? A decision standing on constitutional grounds should provide state legislatures with guidelines by which to gauge the legal permissibility of their mandated attempts at reform.

IV. "Fundamentality" and Standing: Some Unresolved Constitutional Questions

There are at least two analytical problems with the equal protection argument made in *Serrano;* the doctrinal origin of the "fundamentality" of the interest in education ascertained by the California court, and the peculiarities regarding the standing of the particular plaintiffs to raise the issue of a denial of equal protection.

A. "Fundamentality"

The legal significance of finding a "fundamental" interest is obvious for the constitutional lawyer, but perhaps unnecessarily obscure and confusing for the layman. A brief digression is thus in order.

When a statute is challenged on the basis that a classification it contains or imposes violates the equal protection clause of the fourteenth amendment, courts usually sustain the validity of the classification. In view of the virtually infinite number of different groups and the impossibility of exactitude in legislating on most issues of any complexity – particularly in matters of economic regulation – the judicial reluctance to overturn legislative judgment is understandable. The constitutional standard is highly permissive: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[6] As the court has repeatedly stated, a classification does not offend the Constitution simply because it "is not made with mathematical nicety or because in practice it results in some inequality."[7]

However, the Supreme Court has found that a select group of important interests deserves special protection under the Fourteenth Amendment. Accordingly, the court imposes a much more demanding standard of judicial review. The standard is phrased in differing formulations, but requires the courts to view the classification with strict scrutiny when dealing with a "suspect classification," which touches upon a "fundamental interest." If these special circumstances are present, the governmental entity must then show that the classification is necessary to further a "compelling state interest."[8] In no Supreme Court case since 1944[9] has an interest sufficient to sustain the governmental burden in these instances been upheld.

In view of the virtual certainty that the finding of a fundamental interest and a suspect classification will serve to invalidate the legislation, it is crucial to examine with precision the criteria by which an interest can acquire the epithet "fundamental."

To find that the "interest" in education was "fundamental" the California court engaged in a clear extension of existing doctrine. The language of "fundamental interest," of course, does not appear in the Equal Protection Clause; and the word "education" appears neither in the Fourteenth Amendment nor in any other significant passage of the United States Constitution. Almost literally out of whole cloth there emerges a court-constructed fundamental interest in education. By cutting and pasting dicta from decisions on other issues, the court persuaded itself that the impact of education was so significant that the values and interests could, in a constitutional sense, be characterized as fundamental. The real question, however, is whether the court has done anything more than say that education is "very important."

It may readily be conceded that education is very important, but constitutional adjudication has traditionally proceeded by virtue of different standards, and with reference to the requirements of an ascertainable constitutional text. Previous cases, including those involving "wealth" classifications and concerned with voting,[10] with racial discrimination,[11] and with criminal procedure[12] have located the source of the fundamental protected values **within** the textual confines and political value statements of the constitutional document itself.[13] There are weighty and respectable reasons why the courts should continue to restrict the ambit of judicial discretion to such ascertainable sources. If a court is unconstrained by textual limitations, and seeks to incorporate into constitutional doctrine its own value judgments and social policies, it is engaging in the espousal of a judicial natural law. By the same token, it subjects itself to the same indictment for acting as a super-legislature as brought the Supreme Court and the nation to the brink of constitutional crisis in the halcyon days of substantive due process.

The most troubling aspect of these categories – the compelling interests, the suspect classifications, super-rationality standards, and fundamental interests – is their infinitely malleable putty-like character. They are subject to endless manipulation; but they contain no logically compelling internal direction nor do they contain any internal principle of self-limitation. A generation of constitutional law scholarship has enumerated the dangers of treading on this kind of doctrinal ground.

Apart from these arguments, however, it is difficult to determine in this analysis why education is a "fundamental" interest and other kinds of important interests are not. The Supreme Court has intimated (and Professor Coons has admitted) that other interests such as housing[14] and welfare[15] are not "fundamental." The primary rationale offered by Professor Coons to elevate education as a fundamental interest is his argument that education – distinct from other governmental functions – has such a direct relation to political life, to one's ability to function in the world with his peers, and to formulate meaningful political values and civic commitments[16] that it apart from the others deserves the epithet "fundamental."

Clearly articulated as an empirical proposition, this last view is at the very least disputable, and most probably demonstrably false. Everything we know that has come out of Operation Headstart, studies of the first five childhood years, conclusions from the Coleman report, and psychological studies of the socialization of the child show that early home life and the character and the quality of his pre-school and extra-school life – in short, the areas directly affected by welfare and housing programs – are at least as significant in the substantive formation of attitudes as anything the child will ever receive in the classroom. Apart from whether a legislature constitutes a better forum than a court for debating this issue, how can one interest, arguably less important, be justified as constitutionally fundamental, and the others not?[17] Moreover, the trend of constitutional litigation and legislative enactment with respect to the assertion of the fundamentality of educational values to political participation and a viable civic culture is precisely the opposite to that urged by the proponents of *Serrano*. The abolition of literacy tests for voting surely denigrates from the persuasiveness of the rationale. In fact, is there not a hidden elitist component in *Serrano* itself? Could not a court motivated by more sinister values seize on the fundamentality of the interest in an educated citizenry as the very basis for a "rational" legislative classification awarding rights or privileges to those who are properly educated over those who are not?

B. Standing: Who is Denied Equal Protection of the Laws?

The second conceptual problem with the equal protection argument of *Serrano* lies in the analytical confusion as to the precise injury suffered and the standing of each category of plaintiff to complain of it. Although these are a lawyer's technical arguments, they are matters which go to the heart of the equal protection claim, and therefore require further clarification.

Serrano purports to establish the principle that if school system expenditures within a state reflect the disparate tax bases available to the various districts, the equal protection clause is violated, whether or not the per capita expenditures per child are identical. Instead of the individualized standards governing claims in past instances of a denial of equal protection, we see the use of an aggregate comparison. The denial of equal protection, if any, lies with differences in district, not individual wealth. What must be clarified is the arena of injury and the relationship of the injury that is suffered to the particular remedy that is offered by the court. What, in fact, is compelled? Is this a taxpayer's case or a children's case? Or does it achieve its seemingly persuasive logic only by an impermissible amalgamation of rationales taken from each of these independent areas?

Let us be precise about the stakes involved in the argument. If this suit is really not at heart concerned with the character of the education received by children (which, by hypothesis it is not, because equal per child educational expenditures among districts will not foreclose the suit) then the real thrust is inequality among taxpayers respecting the services they receive. If this is the case, then this is not really a "fundamental" interest case at all, and there is nothing to limit the rationale to education as opposed to any other areas in which people might have an interest in state or local government expenditure: parks, housing, lighting, sanitation, police protection, health services, and the like. If *Serrano* is concerned with the quality of educational opportunity available to a child then why does it allow a child who is in a district receiving equal expentiture to sue? Indeed, why does it allow a child to sue when he is living in a district wherein he receives a greater educational expenditure per capita than children in another district?

Let us put the questions as a simple assertion. Each class of parties seems to piggyback on the constitutional disabilities of which only the other can properly complain. Only by joining plaintiffs and by having their mutual presence impute some derivative form of standing to each other is the injury associated with one even plausibly imputed to and arguable by the other. The injury to one – lower educational quality – is associated with the remedy belonging only to the other – greater taxpayer equality. Ironically, the court fails totally to discuss this issue. The opinion of the court assumes that each cause of action can permissibly incorporate the counts and allegations of the other. This appears, however, to overlook a glaring analytical hiatus. The taxpayer should have no standing to raise the issue of the quality of education, and therefore the fundamentality of the educational interest should be irrelevant to him. It would also seem clear that a child ought not to have a demonstrable injury based on the quality of the tax effort, at least if he is receiving equal educational expenditures. The resolution of this anomaly must await further discussion by the proponents of *Serrano*. This is only one of the unresolved problems inherent in moving to a standard of district rather than individual wealth, and aggregate rather than particularized analysis.

V. Conclusion

From what has been said above, it should be apparent that if *Serrano* is to be followed, it constitutes an extension, not an application of existing doctrines. Many scholars and laymen appear to have seized on *Serrano* as the latest stick with which to beat the dog of an admittedly inequitable system. That tactic, however, is at least slightly cynical, and indeed, potentially dangerous as a principle for utilizing the court system.

This is not a lawyer's debate alone. *Serrano* has foreclosed important areas of legislative policy-making. It has foreclosed many kinds of local spending options.[18] It also forecloses state constitutional amendment as an avenue of reform. If school financing cases are decided on federal constitutional grounds, then nothing can be done to restructure finances by amending a state constitution. If the decision were reached on state constitutional grounds, then the people of the state could choose the form and package of their school aid without fear of violating an unreachable constitutional provision.

The constraints under which all tax reform proposals have operated are fairly obvious. The referendum and the seeming unwillingness of the Oregon electorate to accept a sales tax all narrow the choices among reform proposals. Taxpayers may simply refuse to deliver on important revenue demands. To the extent that *Serrano* really mandates a level of spending or particular type of financing scheme, it may simply be unacceptable. The political consequences of this confrontation are weighty – and even explosive.

All of this critique having been offered, it is nonetheless clear that this very necessary healthy national debate would never have come about without the *Serrano* decision and without the kind of effort that John Coons evidences in his research and presentation. It is in the spirit of this kind of inquiry and genuine concern that we have him to thank. It may well be that the debate would never have occurred without him; it is clear that his penetrating insights have illuminated the alternatives. For that reason alone, he deserves our thanks and our respect.

FOOTNOTES

[1] 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971).

[2] Office of Education, U.S. Department of Health, Education & Welfare, *Equality of Educational Opportunity* (1966). The recent study on inequality conducted by Christopher Jencks of the Harvard School of Education appears to be a powerful confirmation of this view.

[3] No. L-18704-69 (Super, Ct. Hudson County, N.J., Jan. 19, 1972).

[4] Several of the commentators seem to have misunderstood this point. See, e.g., Comment, "Equality of Education: *Serrano v. Priest,*" 58 *Va. L. Rev.* 161, 166 (1972).

[5] *McInnis v. Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *Aff'd. Mem. sub nom. McInnis v. Ogilvie,* 394 U.S. 322 (1969).

[6] *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

[7] *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

[8] See, e.g., *Shapiro v. Thompson,* 394 U.S. 618 (1969)

[9] *Korematsu v. United States,* 323 U.S. 214 (1944). Since this case involved Federal restrictions, not state action, its persuasiveness for equal protection jurisprudence is only by analogy.

[10] *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966).

[11] *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954); *Griffin v. County School Bd.,* 377 U.S. 218 (1964). See *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 682 n.3 (1966) (Harlan, J., dissenting); *Cf., Loving v. Virginia,* 388 U.S. 1 (1967).

[12] *Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956).

[13] But *Cf., Skinner v. Oklahoma,* 316 U.S. 535 (1942).

[14] See *James v. Valtierra,* 402 U.S. 137 (1971).

[15] See *Dandridge v. Williams,* 397 U.S. 471 (1970).

[16] The *Serrano* opinion asserts this view repeatedly. Professor Coons finds an analogue in the values protected by the First Amendment, however, legal authority supporting such a proposition appears non-existent.

[17] One answer is precisely to argue that there is no distinction. Some proponents of *Serrano* argue that a whole range of municipal services – police protection, housing, sanitation services, and the like – must now be affirmatively mandated by the courts on the basis of equality of right. See *Wall Street Journal,* Monday, March 13, 1972 p. 12, col. 2:

> "...Perhaps understandably, the lawyers closest to the Serrano suits play down talk of sweeping revisions in public services. The success of their litigation depends in good part on a painstaking legal theory that education is something special – 'a fundamental interest,' in constitutional parlance...Some lawyers predict that if education is accepted as a fundamental interest, other public services are bound to follow. But they don't like to say it out loud. 'They want this to stick,' one attorney says. 'You stress that education isn't like garbage. We are playing a game here. You have to (in order) not to frighten the courts away from a proposition that's sound.' "

The principal problem lies not with the desirability of improving the equity of access to needed services but with formulating standards of judicial scrutiny which are meaningful, fair and manageable. Thus far only one decision seems to indicate any judicial intrusion into this new political thicket. See *Hawkins v. Town of Shaw*, 437 F. 2d 1286 (5th Cir. 1971), *aff'd en banc* 40 *U.S.L. Week* 2671 (April 11, 1972).

Even here, however, it is possible to find the *ratio decidendi* of the case in more traditional court-imposed requirements of affirmative action to achieve compensatory justice in rectifying past instances of systematic racial discrimination. Compare *Griffin v. County School Bd.*, 377 U.S. 218 (1964). See also Comment, "*Hawkins v. Town of Shaw* – Equal Protection and Municipal Services: A Small Leap for Minorities but a Giant Leap for the Commentators," 1971 *Utah L. Rev.* 397.

[18] The McElroy Commission on Educational finance has recommended a disparity of no greater than 10% among allowable additional revenues raised by local district effort. However, the point may be moot. One may well question whether *Serrano* will allow **any** local district supplementary revenues to be raised from the strictly local tax base.

MORNING DISCUSSION PERIOD

Professor Coons: Taking into account a few of the points that Professor Frohnmayer made so eloquently and so pungently, I'd like to first talk about the fundamentality of education within the constitutional argument and as a practical matter what effect calling it fundamental, or something else, may have. There is an issue here that none of us has referred to very clearly. The fundamentality question comes down to what we call the "equal sewer" problem in one of its aspects. That is to say, if education is a fundamental interest why not housing, sewers, police, fire, etc.

Professor Frohnmayer verged on that, suggesting what a cataclysm of judicial activity is involved in taking on fundamental questions, questions as he put it of fundamental importance. Now I would like to diverge from that and say the question of fundamentality in the constitutional mode is not one of importance; or at least not of importance only. We have many kinds of constitutionally protected interests whose special character springs not necessarily from their importance, but from their specificity or from some historical or other quality about them. Education is to be distinguished from housing, fire, health services, etc. not simply by virtue of its being important to the individual, but rather because it is an intellectual interest, it is an intellectual right about which we are speaking which ultimately is closely wedded to all we think about when we think about the freedom of the mind. I won't go into this in detail, but it seems to me that the argument for fundamentality ought to be cased in terms of the imposition of the state on the student's mind and the opportunity of the student to develop his mind through public education. We're talking about his head and not about creature comforts. So that in some sense it may be consitutionally more significant to be educated than to be alive. Constitutionally significant, not because it's more important to you, but because it has a special hook in into the first amendment.

It also has another hook into the political rights protected by the first amendment. Professor Frohnmayer said, "Well you know the constitution really only protects specific rights, we really ought to limit the equal protection clause only to those specific rights." But I challenge him to find in the constitution any specification to the right to vote. Certainly, the court has gone so far now in protecting voting that it has become part of our constitutional system as a specially protected right. Now if voting enjoys this protection, it seems to me that the rights of the mind, the right to be a full-fledged and functioning citizen through education, may be embraced by the same kinds of constitutional consideration that support voting and support free speech and support the right to know, etc.

Now I grant you that this is not a logical proposition; it is a value-impregnated kind of idea, but that's what the first amendment and that's what voting rights are all about. In a sense voting is so unimportant to any individual that it really doesn't matter much whether he does it or not. Just as Justice Learned Hand once said, "Voting is one of the least important acts in my life." He didn't mean that voting, the democratic system, was unimportant, but that he played so small a role he never decided anything. It was only the mass that was relevant. In other words, I think that sheer importance is a subtle question. Constitutional importance may be a different question.

Now as respects the standing question that's a very difficult and subtle point that Professor Frohnmayer made so well. I will confound it even further by suggesting that under the definition of the injured class in *Serrano* one has to include the children of Beverly Hills. The injury is a relative one, that is, one is always injured in relation to one who is richer because of the richer person's access to tax resources, and there are richer districts than Beverly Hills. Thus the poor children of Beverly Hills are being deprived by that standard. Now that's kind of incongruous. On the other hand, the whole notion is one of relativity. That is, the state ought not to create a system in which one group of its citizens has a state-created advantage over others with respect to public education based on wealth.

Now looking at it that way, there is always injury to be defined in relation to some other district above you until you have reached the richest. Now tying that into the child and asking yourself whether it's a taxpayers' suit or whether it's a child's suit, I would suggest that for me the most meaningful way to think about it is that the child is not asserting a right to equality in spending at all. He's not saying that I have a right to equal spending. Nor is he saying that if you give me equal spending that I'm satisfied. He's saying that my right is really a political right because education ought to be thought of as a political right. I share a right to equal access of my political representatives to educational tax resources. You ought not to create political entities which are incapacitated to perform what you're going to do to me in making me a citizen. You want me to be a citizen, you designed the system to make me a citizen, to educate me, to make me functional, be a senator, whatever. You ought to create a political system which does not make it inevitable that the voters who are my surrogates, my representatives, cannot have equal opportunity to give me access to that kind of experience. So it is a political right that we are talking about, a political right to education. And it is in this sense that one can see that mere equality of spending may not satisfy the norm.

There is one other thing I would like to suggest about the rationality question. It is true, I think, that the rationality formula, the constitutionality of irrationality as a test of equal protection or lack of equal protection, is conceptionally applicable. It depends upon how you state the purposes of the system. If you say the purposes of the system are to provide equality of opportunity for children, clearly it does not do that. The system is not carried out, the mechanism frustrates that purpose, therefore it is irrational and therefore it is at fault. The trouble is it proves too much pragmatically because that is the structure of all of our public local services and no court is going to apply the rationality test to strike down all local services. It must find another way, a respectable way hopefully, and a judicially manageable way to get at this underlying irrationality in another mode which limits the effect of the decision to education. And I think that's proper. It should be limited. I think education is different, as I've already said, from other kinds of public services and that is to me, however, the most salient reason for avoiding the rationality argument. The rationality argument will play a role, I think, in certain kinds of litigation respecting wealth discrimination in education, the textbook case that I told you about can be handled rather elegantly, I think, under the rationality rubric without going into the fundamental interest test, but we shall see.

Professor Frohnmayer: Just as Professor Coons' constitutional theology is equal protection, I suppose mine is the First Amendment. Even so, I still find difficulty in the tracing to the First Amendment of the kinds of values on which the fundamentality of the interest in education is asserted to rest. Doctrinally we are light years away from any solid support for that conclusion.

Second, with respect to those rights which have been recognized – voting, for example – there are several clear and tangible provisions in the constitutional text itself. For example, art. I, § 2 and the Fourteenth, Fifteenth, Ninteenth, Twenty-fourth and Twenty-six Amendments, to support the conclusion that the right to the franchise is a fundamental part of our political society. Education, at least from the point of view of the positivist legal theory, can claim no such pedigree. With respect to the issue of standing, the anomaly is that a child from a rich district or a child from a district in which there is an above average per child expenditure can still complain. Professor Coons explains the anomaly by virtue of what he termed to be a "political right" – the political right to education which might not be provided by mere equality of dollars expenditure. My problem with that proposition is that I simply don't know, in constitutional terms, what it means. If doctrine is to be used to tell you how much is too much, or where you can stop, or what framework for state educational plans is constitutionally appropriate, I find the explosiveness and the malleability in that doctrine to be very dangerous. This is the thrust of my expressed disquiet with respect to the issue of "fundamentality." Legislatures deserve clearer direction, and the *Serrano* doctrine can never provide it as long as it espouses the "education is really a political right" kind of rationale.

Mr. Winger: There is some talk of where the fundamental interest comes from. Professor Coons says maybe the First Amendment and if you want to tie it to the constitution that's where you probably would get it if you get it anywhere in the constitution. I would suggest that one alternative is to look to the state constitutions – the state's recognition of education as being a fundamental interest. Education is one of the few services the state provides for in its constitution and this might be one way a court can look at education and single it out and also put it within the reach of legislative amendments that Professor Frohnmayer has mentioned; put it closer to the state in their power to amend this if the public did not go along with the feeling that it was so fundamental.

Member of the Audience: I think Professor Coons pointed to the San Francisco area and the leaders there who realize that the *Serrano* case could be of monetary detriment to that school district. What was the principle that they were trying to uphold?

Professor Coons: The question is why did the San Francisco unified school district come in as an *amicus curiae* friend of the court to support the plaintiffs in the *Serrano* case when San Francisco is a richer than average district. There were several reasons. One is that while San Francisco is above the average assessed valuation per pupil, the relevant comparison is not the average but rather competing districts, such as Hillsborough and Atherton and so on, where middle class citizens can escape to lower taxes and higher spending.

In other words, much richer districts than San Francisco. It isn't simply the average district with which they wish to compare themselves. I think however, it is also true that in relative terms, again, cities see themselves as sliding toward the average in many cases and San Francisco is looking to the future and taking a longer view than simply the immediate fall out of a decision like this. But thirdly, and more generally, it is my interpretation that the school board ought to be prepared to engage in the restructuring of the total system simply as persons who see that ultimately it is to all of our interests to have a fair and rational system. San Francisco is likely to come out at least as well as it is now in a full legislative re-examination of the question. They are not afraid to submit their special needs as a city to the attention of the legislature. And that's true everywhere. I don't think Charles Benson opposed *Serrano* as the director of the New York Fleischmann Commission despite the fact that New York City was going to seem to lose in the short run. Ultimately one has to rationalize that system of chaotic privilege and disadvantage, and New York City can be taken care of in the political redefinition that's coming if *Serrano* survives.

Member of the Audience: It is not very clear to me whether the *Serrano* decision extends to capital construction.

Professor Coons: I think it would extend to capital construction perhaps as we lawyers say *a fortiori* because in few states and certainly not in California is there any substantial state subsidy for capital improvements. Now clearly in this constitutional norm there has to be a definition of education so that there may be tinkering along the boundaries by school districts or municipalities to figure out how they can exclude swimming pools from education and put them on the municipal property tax separately, if you're in a rich district, or how to bring in police, if you're in a poor district that's power equalized. It's bound to be a matter of definition. But I think the historic pattern of definition of education in the state is what the court is likely to apply and we'll have to deal with these kinds of less important but interesting issues as we go along.

Member of the Audience: I was wondering if Professor Coons would care to speculate on the opportunity that appears to be presented by the legislation which you were speaking about. Could you suggest for our consideration particular forms of school governance which would be different from the present kind of school board governance?

Professor Coons: The potential patterns of governance are many so I'll just try to say something that will deal with what I think is sort of the middle kind of opportunity rather than deal with everything. Suppose that you look at it from the point of view of the people who wish to have so-called community control. That is, the Ocean Hill-Brownsville experiment in New York, or something analogous to it, where neighborhoods in large cities wish to express their special qualities, whatever they may be. They wish to have an identity which is expressed through power over schools. *Serrano* may have, if it survives, some application here because since power equalizing systems would become politically imaginable, you can think of Ocean Hill-Brownsville as an economically viable school district. That is to say, what would not be absurd, that is the creation of an inner-city, independent, small neighborhood school district – absurd because it has no tax base and is broke constantly, – would now become quite plausible through giving the citizens of that narrowly defined geographical area an opportunity to express their educational interests through self-imposed taxation subsidized in the way that I described before. That is, for any given tax rate you get the same output, it's the rate that counts, not your wealth that counts. And so, in a sense, the historic movement for consolidation of school districts which had as one of its objects the *Serrano* kind of result, that is equalizing of the tax bases, now could be inverted or reversed so as to provide more fragmentation in the name of local control and autonomy.

Now at the same time, probably not so much in Oregon, I guess, because of the less exaggerated character of your minority problems, but in other states that kind of opportunity may be coupled with real integration problems, because the more that you fragment school districts geographically the less you make possible social integration as in the current Detroit or Richmond plans. That kind of model that I just described is a political-geographical model in which people vote on how much to spend and on how to run their schools within the limits that the legislature gives them. In that kind of model you have winners and losers. That is to say, majorities in the school district decide school policies on spending, on style. That troubles some people. It brings back to me what I call the third problem in public finance in public education, that is choice and freedom.

There is another model of community control which has as its focus a different community, what I would call the community of interest rather than the community of geography, in which people cluster not by their neighborhood but by the style of education which they want but cannot have unless they are sufficiently affluent to afford it. It is possible, in other words, to give families the capacity to choose their style of education through a well designed voucher system. It's really too complicated to spend any more time on here, but if any of you should happen to be interested in notions of apparatus for fair control of such a system so as to prevent imposition on the poor, minorities, so on, I would recommend to you a book called *Family Choice in Education* by Steven Sugarman and myself, published by the Institute for Government Studies at the University of California, Berkeley.

Member of the Audience: Professor Coons, I wonder if you could explain in more detail the path of this power equalizing formula, how it would work, in particular with reference to people of low incomes vs. people of high incomes?

Professor Coons: Well, in terms of detail I suppose that you have a lot of choices in terms of apparatus. Some of you may not have been here but a simple example of this is suppose a $600 state flat grant to start with. Further assume that the $600 comes from a statewide property tax of, let's suppose, 20 mils, 2 percent. On top of that the state says to the district, you can have more if you want it but you can only have it according to this formula: for every mil, you get to spend another $25. Now suppose we take poor district X, which wants to spend $1200. That would mean it would have to add 24 mils–24 times 25 is $600. That plus the basic rate of 20 mils ($600) would make $1200. So they would add 24 mils to the local tax rate, making their tax rate 44 mils. Understand that the number of mils is totally arbitrary. Don't panic if that sounds awful in Oregonian terms, because as you know these things depend upon the assessment rate, the divisor–how many times you split it before you use the number at the bottom to apply the brake to and so on. This is a hypothetical example. The point is that the districts do get this option.

Now where does the money come from to supplement the poor districts that can't raise $25 with each mil. That's an important question. You could have a highly regressive tax to support that subsidy so that in part you would be taking away from the poor people what you would be giving back to the poor districts, and as Mr. Kirkpatrick and Professor Frohnmayer pointed out you may have rich people living in poor districts. So I'm coming back to the second part of your question ultimately. I think perhaps I would recommend that if you were going to power equalize in this fashion, that you use a local income tax because the income tax tends to be somewhat more progressive I think. Though it depends upon how the property tax is rigged too. The one way to make this more progressive is to use a local surtax. That is to give every school district the opportunity through referenda to add on to the $600 through a locally chosen imposition, surtax, on their income tax. That is a fairly progressive way to to do it—progressive with respect to poor people as well as poor districts. I would think that would be a much more reasonable way to do it. The reason we use the property tax example ordinarily is that is the historic way to do it, politically it may be more likely in some states than others. Now Kansas has thought of doing it with a combination. They add a combination of local property tax and locally chosen surtax on their income tax. Minnesota is the same thing.

Now as far as it's effect on the poor, what can I say? The *Serrano* result as has been indicated clearly does not help poor people living in rich districts. One is depending in some measure upon the legislature producing a system which will be uniformly fair rather than one which is now a mosaic of disadvantage and privilege. But is is clear, I think, that poor children living in poor districts represent a very substantial part of the poor who are now among us and someday soon we are likely to know a lot more about it. That is, we will know where they live from the 1970 census and can make more keen and much clearer judgments about how one would go about taking out of a new system any special imposition or disadvantage on the poor.

Member of the Audience: I am unsure what goes into determining what is a rich district and what is a poor district. What if a district area has other sources of revenue than a property tax?

Mr. Winger: Your problem goes to the municipal overburden that Mr. Coons referred to in explaining that many of the large urban centers have all those sewer taxes and other taxes that they have to consider. I think this is one of the problems with *Serrano*, it doesn't really address itself to that one problem. It distinguishes away these other public services and says that the holding only goes to education finance. The income factors operate the same just inversely to the other one, the different tax burdens that the areas have. The forest revenue is just one example, there are many others that the statutes in Oregon provide for and any revision of the financing of schools will have to take into account these monies coming in and reallocate them somewhere else rather than to schools. Federal money from forest revenues can just as easily be given to the counties as they are now, but earmarked for other services to relieve some of this municipal overburden.

Professor Coons: I would say that with respect to federal forest monies, if they are given simply chaotically, that doesn't violate the *Serrano* rule. It may violate the rationality rule, I don't know. There would be nothing in the *Serrano* principle to forbid the spinning of a wheel in order to give out the same number of dollars that are now given to districts. That is, you could have districts that are going to be high spending districts and low spending districts chosen at random by luck – say pull them out of the hat. There's nothing in *Serrano* that prevents that. There's nothing in *Serrano*, incidentally, which even requires public education, so that one answer may be to abolish public education. But to be more specific about the question with respect to assessed valuation per pupil, what you have that you don't have in the other cases, the anomolies of income and so on, is a state-created measure.

The state has defined the system, the state has said this is a system for purchasing goods and services called education and we will impower sub-units of government called school districts to do this. We will now rich districts and we will have poor districts by the following definition: assessed valuation per pupil. In the language of *de facto* and *de jure*, this is somewhere toward the *de jure* spectrum, that is if you had a fair system of property wealth, tax resource distribution among districts, but if you had a less than uniform distribution of income it would be quite fair for the state to say, "We didn't make the people poor; we make all the districts equal; so if there is any discrimination among districts whatsoever it is purely *de facto*." The court may then say we're not here to correct every imbalance or every injustice that nature has visited upon man but only those injustices which are state-created. Now that's lawyers talk but it sometimes makes a difference in outcomes of cases.

Member of the Audience: To go back to the power equalization formula, I assume this is your device to allow individual school districts to enrich their programs. If there are no limitations upon your power equalization what is to prevent in later years different districts being identified as districts which have greater commitment to education than other districts are willing to pay for and thus propound the same inequities that we are trying to cure now?

Professor Coons: I think districts would become identified as high spending districts and low spending districts, in any case their spending would not be related to their wealth because for every imposition of a new tax they can only spend whatever the legislature has defined in the formula as the outcome of another mil's imposition. For instance, for every mil, they can only spend $25. In a sense, that's the whole point of having that kind of system of local add-ons, to let people make different choices of how they feel about education; so that one district says yes we are a high spending district on education which means that we'll have less in parks, but another district will say that we're low spending because we are very park-oriented or library-oriented or police, fire, and so on, or we just like to keep more in our own pockets to buy televisions or booze.

Mr. Kirkpatrick: I just wanted to make a brief response to one of the questions. Here's the difficulty I have with the Serrano theory: the *Serrano* theory is that a state in discharging its educational obligation cannot do so by dividing the state into school districts and having the wealth of the education provided to children in different school districts be dependent upon the amount of real estate per pupil in those school districts. That's unfair to those children. Is it any more fair from the point of view of the school children to have the state divided up into school districts where maybe the financial resources are equal but one child happens to have the misfortune of being born in a school district that doesn't value education very much? Maybe the people in that school district aren't well educated themselves or they don't want to pay as much for education or don't value it. From the point of view of that child he's being just as much discriminated against, is getting less of an educational opportunity himself by virtue of being in a certain school district where the priorities are not in favor of education, as compared to some child who is out in the suburbs with professional people who are willing to pay a very high amount to educate him. Looking at this issue from the point of view of the child, I think it's just as discriminatory to divide up on these other factors as it is on the wealth factor that *Serrano* forbids.

SERRANO AND STATE LEGISLATURES: ISSUES OF EQUALITY, QUALITY, AND HOUSEHOLD CHOICE

Charles S. Benson

In *Serrano* and related cases, the courts have handed state legislatures a prickly issue. Legislators, so it would appear, must find a way to remove wealth discrimination in education, but they are not in agreement on what constitutes that form of inequity. They are charged to produce reform while being constrained – by one group or another – to preserve rights of local districts to determine the size of their budgets, to protect the state's own budget, and to maintain a proper rate of advance in quality of schooling. Since control of education is frequently a strongly divided and emotionally charged issue in state government, *Serrano* has naturally aroused great interest.

For all their faults and shortcomings, the systems of state-local finance of educational services are possibly the most thoroughly worked out arrangements in the field of intergovernmental relations the country has seen. Yet, *Serrano* pointed out a major and long-neglected (but by no means undiscovered) flaw in those systems, and it has brought instant rethinking of the way we pay for our second largest public function. As one might suspect, instant rethinking is proving inadequate to requirements of analysis. What I can do in this paper is to lay out a kind of agenda of research on the issues raised by *Serrano*. If this sounds unduly complicated or pretentious, let me plead complexity of the service, the depth of its involvement in the futures of households in our land (considered both as individual households and as the collectivity of such), and the diversity of household tastes vis a vis educational services. I group my comments under three headings: equality, quality, and household choice.

I. Equality.

As far as is presently known, there are only four kinds of actions – with allowance for combinations of features from the four – that state legislatures may take to satisfy the *Serrano* criterion that "quality of education shall not be a function of local wealth." These are reform of the foundation program plan, district power equalizing, full state funding, and family power equalizing. (There is, of course, a fifth, namely closing down the state system of public schools; I exclude this as **primie facie** unrealistic.) Let us take these possibilities in order.

a. **Reform of Foundation Program Plan.** The foundation program plan is what most states use now. That it has not functioned correctly from the equity point of view is obvious from the *Serrano* decision. What is it and why has it not been working right? The basic ideas are these. The state establishes a certain level of expenditure per student per year, call it $500, as the cost of an adequate, i.e., "foundation" program of schooling. This is a statewide figure. It also establishes a local tax rate to represent the proper contribution of school districts toward meeting the necessary costs of educational services. If any district levies school taxes at the stated rate and is still unable to provide a budget equal, say, to $500 a student, the state makes up the difference. In theory, the local contribution rate is determined as that rate which would meet the costs of the foundation program in the richest district of the state. It follows that the richest district receives no state grant for education at all, while every other district is able to provide itself with adequate education at no higher tax rate than what is required in the richest district.

The foundation program plans in use throughout the United States are bastard versions of the simple idea so expressed. Briefly put, the practice departs from the ideal in three respects. The local contribution rate, which, after all, is not a mandatory statewide school property tax, only a computational rate for determining state education grants, is set at a notably higher level than that which would be required to raise the costs of the foundation program in the richest district. The **reason** is to place more of the costs of education on the localities and less on the state. The **result** is that rich districts can provide themselves with educational expenditures at foundation program levels at lower rates of local tax than poor districts. The second inequity is found in the fact that the foundation program amount, calculated on a per student basis, is generally lower than what most districts seek to spend and is notably lower than what should be spent in poor neighborhoods to recognize differences in "capital embodiment" of students. When a district spends at a rate higher than foundation program amount, its tax rate for the extra expenditure is determined strictly by local assessed valuation per student. Clearly, poor districts will be forced to meet any extra expenditures at higher tax rates than rich. The third kind of inequity is found in the practice of the state's giving to rich districts a fixed, minimum grant per student, without regard to their degree of affluence. These three defects combined to produce the result noted in plaintiffs' briefs of *Serrano*, namely, that poor districts have to levy taxes at high local rates to finance meager programs of schooling, while rich districts enjoy two benefits: low school tax rates and expensive school programs.

The foundation program plan can be fixed up but, unfortunately for its advocates, it is an expensive plan to repair. First off, the foundation program amount must be raised upward to a point where courts would agree that expenditures in excess were clearly luxurious in the sense of being non-productive and where so few districts would undertake to spend at those levels that an argument **de minimus** might prevail. Further, this high level of the foundation program expenditure would have to be made mandatory. Next, the local contribution rate would necessarily become a statewide school property tax, at least in those states where minimum state grants per student are a constitutional matter. (I assume that constitutional revisions are, for the sake of argument, not in order.) Clearly we are talking here about a major increase in educational expenditure, an increase to bring all districts up close to what the high spending ones are now paying out. These high spending districts are predominantly rich suburban districts. This effort must be stronger in revising the foundation program plan than in the adoption of full state funding, for the latter, though not the former, implies that the state puts a lid on what rich districts can spend. The courts, I believe, would take such state control of the upper limit of expenditure into account in judging what we might call the "dynamics of equity." Hence, they would require less "leveling up" under full state funding than under revision of the foundation program plan.

It is true that the state might hold its own contribution down by setting the statewide school property tax at a high level. However, this is not a good time to force localities to make more intensive use of a higher unpopular levy. I conclude that reform of the foundation program plan is not a likely prospect for most states. Its prospects improve, though, as a given state previously has managed to reduce the number of school districts to a small number, for consolidation of school districts serves to reduce inter-district differences in local taxable resources. These differences, still wide in many states, are the root cause of the *Serrano* decision.

b. **District Power Equalizing.** As a simplified version of the "percentage-equalizing grant," long used in England to finance educational services, it has been proposed that a plain, i.e., a "one-to-one," relationship between local school tax rates and expenditure per student per year be established by state governments. This relation is called district power equalizing, and it might take the following form:

Local School Tax Rate Per $100 of Assessed Valuation	School Expenditures Per Student
1.25	$ 500
1.50	600
1.75	800
2.00	900
2.25	1,000
2.50	1,100
2.75	1,200
3.00	1,300

This plan is said to remove the influence of local wealth on quality of education. Would that life were so simple!

The California Supreme Court declined to enter the game of defining local wealth. Property tax base includes large amounts of commercial, industrial, and mineral holdings as well as residences. School districts can be rich in assessed valuation per student and poor in average household income. Literal adoption of a schedule such as the above district power equalizing plan could force a redistribution of income from poor households to rich. This would happen as local tax rates rose in those industrial tax havens inhabited by poor people and fell in middle class districts that had no commercial or industrial property in their tax base. (I am assuming that it is impossible to counteract fully such tax rate changes by short-run manipulations of school budgets.) It is also likely that school tax rates would rise in many of the larger cities and big cities have nany poor residents. One may say that poorer households so adversely affected had been enjoying an unfair advantage all along and that justice was finally catching up with them. However, I think most poeple would hold that such a shift of resources from poor to rich households would be bad policy.

In a sample of eight major counties of California, we estimate that approximately 30 percent of poor families in those counties reside in property-rich school districts, districts rich enough to see their property taxes for schools increased under district power equalizing. Further, roughly a third of these poor families that face rises in tax rates would look forward to large increases, i.e., increases of over $3.00 per $100 of assessed valuation (the average school tax rate in California is slightly less than $5.00 per $100 of assessed valuation).

There are several ways to moderate this bad effect of district power equalizing. One is to have the schedule of tax rates and school expenditures so designed that a large amount of money flows into schools from increases in yields of broad-based state tax instruments. That is, state aid for schools would be increased handsomely. Yet, the reasons most people see district power equalizing as a workable solution to the *Serrano* issue is that no large increase in state government revenue is necessarily required when a district power equalizing plan is adopted. This is what makes district power equalizing different from reform of the foundation program plan.

A second possibility to moderate the wrong kind of redistribution of income is to split the property tax role by taxing industrial and commercial properties on a statewide basis and, correspondingly, by leaving only residential property as the measure of local wealth. This is constitutionally possible in New York, but it is probably not in California. Assume that it became constitutionally permissible in California, and then take the case discussed this morning of Emeryville, the place with all the smog, factory dirt, etc., and a small number of very poor households. The local ability of Emeryville under this plan would be measured by the residential values of these poor people that live in Emeryville and industrial and commercial property would become irrelevant to determining the flow of state school money to any given school district.

A still more interesting possibility is to use average household income in school districts as the measure of local wealth in the district power equalizing schedule. The amount of money that a local district would raise for schools would thus come to depend on two variables: average household income and the expenditure per student chosen by the local residents. It would still be possible – indeed I would say preferable – for the money actually to be raised by a levy on residential property. A given household's school bill would then be a function of three variables: average household income of the district, school expenditure level, and assessed valuation of the given household's residential property. Clearly, it would pay to be a rich man in a poor town, in terms of school tax bill! Similarly, poor households in a rich town could be somewhat oppressed. To relate school expenditures to individual household incomes in a closer manner under district power equalizing would require, I believe, identification of students to households by assigning social security numbers to students.

However, possibly the fairest and best solution to this problem is to adopt the kind of "circuit breaker" tax relief plan recently passed by the Oregon legislature. This provides relief from onerous tax burdens in a manner that takes account of the income situation of a given household. Ideally, the plan would apply to all households without regard to the age of its head and it would apply to renters as well as homeowners. Such a proposal was made in June 1972, to the Senate Select Committee on School District Finance, California, by the Committee's consultants.

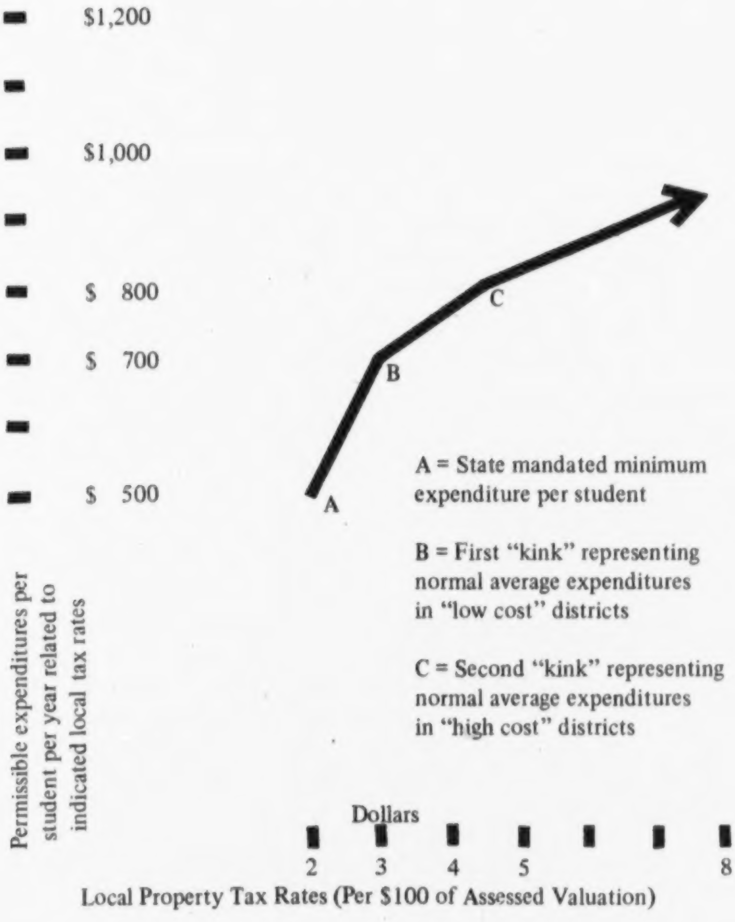
Let us now turn to other topics. There are serious technical problems about what educational expenditures (e.g., operating, construction, debt service, etc.) should be treated in a district power equalizing way, but it is not necessary to enter that thicket in this paper. Another problem, however, must be mentioned. I had previously thought that district power equalizing in actual practice meant placing a lid, quite an absolute lid, on district spending per student. That is, I had assumed that state governments would be unwilling to give districts a "blank check" to advance expenditures to whatever extent they wished, in face of the fact that some districts, not necessarily those of poorest households, might be receiving 90 cents for each school dollar spent from state sources. If the state governments thus were seen as unwilling to **share** educational costs with districts without limit of expenditure, then clearly an upper limit on expenditure is required – otherwise, one remains in violation of the *Serrano* principle. I am happy to report that this problem seems to have been overcome. The device is to use a nonlinear, convex function to represent the relation between expenditures per student and local tax rates (see Diagram I). At each kink in the function, a new relation between expenditures and tax rates is established, such that a lesser rise in expenditure is permitted for any given increase in tax rates. One would expect districts to settle into the various kinks of the function, and this itself is a help in predicting costs of various district power equalizing schemes to the state government.

District power equalizing is ordinarily thought to apply to educational services only. It is proper to assume that certain other local services, such as libraries, health, low-cost housing, and recreation, are complementary to provision of education. What district power equalizing does is to change radically the relative price relationships among local public services, viewing tax rates **vis a vis** unit expenditures as prices. For districts which enjoy a school tax rate cut, e.g., districts poor in assessed valuation per student, these complementary services would be made more dear, again speaking in terms of relative prices. The opposite would happen in districts of high assessed valuation per student. This is a problem worth exploring, but I do not know that a thorough investigation has yet been launched.

c. **Full State Funding.** This plan is based on the idea that educational opportunities as measured by school expenditures should not be a

DIAGRAM I

NON-LINEAR DISTRICT POWER EQUALIZING SCHEDULE, NO LIMIT ON DISTRICT EXPENDITURES



A = State mandated minimum expenditure per student

B = First "kink" representing normal average expenditures in "low cost" districts

C = Second "kink" representing normal average expenditures in "high cost" districts function of the educational tastes of one's neighbors nor of their wealth either. Hence, the state becomes the agency to provide all the money for schools. School budgets rise, but only as state funds for education are voted upward by legislatures, with the single exception that budgets might also rise as the federal government increased the level of its school support. This loss of power of the local district to balance its budget is regarded as detrimental to educational progress by many school board members, etc., but the plan has strong backers in such states as New York and Maryland.

On the revenue side, a full state funding plan commonly incorporates a statewide property tax for schools. Because short-run changes in property tax rates can produce major windfall gains and losses and because at least some of these gains and losses are thought to be deleterious to social welfare, it is usually recommended that the statewide property tax be implemented over a period of, say, five years. The New York plan also included a recommendation for property tax relief of the "circuit-breaker" type, mentioned above. Specifically, it was proposed that anyone who paid over ten percent of state taxable income in school property tax receives a rebate. Twenty percent of annual rental payment was deemed to be national school property tax payments. Since state taxable income in New York is defined as adjusted gross income less exemptions and deductions, this proposal does gratifying things from the point of view of those who believe we should take positive steps toward redistributing income. This can be seen easily in considering rebate possibilities for a family of four persons which has an annual income of $4,000. The relief applies regardless of whether the household lives in its own house or in a rented apartment.

On the distribution side, full state funding plans ordinarily provide for some degree of leveling up of expenditures in low expenditure districts. They also normally include a weighting for students who have some kind of learning disadvantage. There is an interesting policy choice as to whether to regulate this weighting by a household income measure or by student test scores. Let us consider the latter device first.

Use of tests as the distribution criterion is subject to a charge that one creates a negative incentive for school performance — the poorer the students do, the more money comes into the school. The proper response to this charge, it seems to me, is that distributions to elementary schools should be based on an early test, a test, indeed, of readiness to learn, and the distribution to secondary schools should be based on a test administered just as students are to enter those institutions. For the negative incentive to operate, then, it is necessary to assure collusion of elementary and secondary teachers. As secondary teachers would be unable to shift any part of their financial gain into elementary schools it is difficult to see how elementary teachers could be persuaded to play the game. Furthermore, on a statewide basis, the use of an income measure, even, is not free from negative incentive effects. In the last resort, one must trust the professionalism of teachers.

Test scores may be written as: $MA = f(GP, EN)$,

where **MA** is measured achievement, **GP** is genetic potential, and **EN** is environment. It is easily seen that the use of test scores obscures the factor of genetic potential. Advocates of an income measure would hold that special state grants should compensate low-income students for embodied capital that middle-class students acquire through their environmental beginnings. The problem may be illustrated by the following example. Suppose there is a youth of high genetic potential who has grown up in a poor neighborhood. Assume that his environment represents a disadvantage in his educational performance. Assume further that because of his high genetic potential, he is able to overcome his environment to the extent that he obtains a middle score on a readiness test or, say, on an achievement test. If we are using test scores to identify need for special help, he would probably not earn an extra grant and would not receive assistance to help him realize his high potential. By an income measure for distribution of grants, however, he would be eligible for extra services and his chances of realizing his potential would be improved.

Yet, as we have just illustrated, the use of the income measure would distribute the special funds over a broad group of students as measured by their current academic performance. The youth of our example could not be described as an educational failure. So the choice as between the test score criterion and the income criterion calls for a definition of objectives. If one is concerned with establishing policies to help schools overcome abject educational failure, then one might want to use test scores to concentrate the money just on youth who are identified as persons strongly failure-prone. If one is concerned with releasing academic potential of the whole set of youths who grow up in poor neighborhoods, then one might want to use the income measure.

However, it is possible to make a convincing argument that educational failure had best be overcome by assuring that students are provided an adequate standard of nutritional, health, housing, and recreational services. Concentration on within-school academic services may not be cost-effective nor even, possibly, effective at all (within the span of years a human being is going to spend in attending a school). Unfortunately for the use of tests as the grant distribution criterion, that criterion appears to demand—on the surface at least—that the extra resources for educational disadvantaged be kept within the schools. The income measure viewed as an "equalizing of capital embodiment scheme" might offer greater latitude in spending funds of services supplementary to the educational program. I think this is an advantage for the income measure. But lastly, it should be pointed out that the income measure seems to imply that the blame for educational failure rests on the home. I prefer the likely connotation of the test score measure that schools are failing to provide services compatible with the cultural backgrounds of the students they enroll and (at a given point of time) their readiness to learn.

One additional observation about full state funding is in order, I believe. The plan will probably work best if states strengthen their regional educational offices, to the end that high-cost services and services susceptible to economies of scale are provided to districts as "aid in kind." At the least, this approach lessens the requirement on the state to make close judgments about how much money the different districts require, and such judgments are always difficult to make when dealing with services like education.

Now I would like to make a personal assessment of why the Fleischmann Commission went to the full state funding recommendation. It is a strong recommendation in that there is an absolute lid placed on school district spending: there is not local optional add-on of 10% or otherwise, such as is recommended by the Advisory Commission on Intergovernmental Relations. It sounds paradoxical but I think the reason for the strong recommendation is past success in education finance. New York is the state that first developed the foundation program plan and spread the idea across the United States. New York State in 1962 adopted a percentage equalizing plan (in other words they had a kind of district power equalizing scheme 10 years ago). New York State from state sources provides half of school expenditures and New York State has the highest school expenditures of any continental state. New York State from state sources provides more money per student per year than many districts spend in total (per student). Given all this, the Commission looked at the results, namely, those same kinds of inequities described in the *Serrano* decision, and they simply gave up. They said we don't think that further manipulation of these old kinds of arrangements as between the state and localities are going to help us overcome the problem that the *Serrano* decision referred to. They were on this track I might say from the beginning and this meant that they were going this way a full year before the *Serrano* decision. That is what I mean when I say I think it was success in education finance that New York State – by conventional standards, of course – juxtaposed on a rather harsh view of the results so far obtained that pushed them to the rather extreme recommendation on full state funding.

d. **Family Power Equalizing.** This is the privatization approach as developed by Professor John Coons of the University of California. Under this plan, each household, in effect, becomes its own school district and makes choices about which schools, publicly or privately administered, that it wishes its children to attend. Family power equalizing proposes that grants to households be arranged so that families of quite different levels of income are enabled to exercise educational criteria, as distinct from cost criteria in making their choices. Poor families as well as rich thus are enabled to choose expensive schools, if they so wish, at roughly the same relative costs to the household budget.

Under one version of family power equalizing advanced by Professor Coons, there might be four categories of elementary schools, spending $500, $800, $1,100, and $1,400 per student per year respectively. A family of income $5,000 per year might be required to pay 4.0 percent of its income to enroll its children (all of them) in the $500 school and 5.5 percent of its income to enroll them in the most expensive one, i.e., the $1,400 per year expenditure school. A richer family, one having an income, say, of $15,000 a year, might be required to pay 3.0 percent of its income for the cheapest school and 8.0 percent for the dearest. School tax rate would be a function of quality of school chosen and household income. The same arrangement would apply at the secondary level and both public and approved private institutions would be covered.

The plan's strength is that it provides for the first time a substantial measure of choice in education for poor families – approximately the same degree of choice that wealthy families have always possessed. At the same time there are critics who contend that the exercise of powers of choice in education would lead us in anti-social directions, and that too much racial, religious, and political separatism in educational institutions might emerge.

II. Quality of Education.

Just as the California Supreme Court did not explore definitions of "local wealth" neither did it pursue the question of "quality of education." It took it for granted that quality was sufficiently related to dollars to expenditure per student that the matter could be left at that point. This is not entirely satisfactory. Measurement of quality of education is admittedly difficult, but the first thing to recognize is that there are different meanings to the term. For the middle class resident of the suburbs, an essential element of quality of schools is whether they prepare his child with skills to obtain admission to a good college or university and a set of attitudes that will prize that accomplishment. Of course, the suburbanite may want much more, but unless college-going is achieved the other good features of quality education cannot compensate. To take another extreme, a household in a poor neighborhood in the inner city may define quality in terms of two-way busing, because he may feel the primary need of his and other children is shared experience in order that the deep divisions that pain our country may begin to be healed. These alternative definitions of quality are not separable. Two-way busing clearly involves the suburbanite as well as the resident of the inner city. As long as the incentive structure in American education is progressively to remove the talented teacher from working with students in the low-ability tracks of schools in poor neighbors to teaching high-ability students in rich suburbs, the suburbanite's definition of quality impinges on the child of the inner city.

But like the court, we cannot enter into such complexities and must try to deal with a simpler question: what are the likely effects of *Serrano* on the rate of advance of educational spending? My general conclusion is that the rate of advance in spending will be dampened.

Let us recall that reform of the foundation program plan appears not to be a viable response to *Serrano* because of the high initial cost of achieving that reform. Think now of the full state funding option. The rate of advance in spending would be determined essentially by the actions of state legislatures, as we cannot expect the federal government to move strongly into educational finance in the near future. Tax instruments in common use by state governments are not highly income-elastic; yet, state governments are grievously affected by inflationary rises in costs and, so far at least, the federal government has appeared to be neither willing, or if willing, then able, to control inflation. Increases in rates of state taxes are notoriously risky for members of state legislatures to vote for. It is known that the backlog of state requirement, whether in mental health, prison reform, welfare, medicare, or ecological concerns, is enormous. Pressures for expansion of higher education are formidable. The outlook for substantial rises in grants for **schools** is not bright. But the essential point is this: when one moves to state financing, one loses the dynamic force of competition of the small district's expenditures against another. The operation of the demonstration effect is gone, and we shall no longer see a ratcheting up of educational funds through local competition to take care of one's own children.

It might be argued that district power equalizing, which is a viable response to *Serrano*, will preserve all the features of local competition to spend that I have just alluded to. I think this is not a correct view of district power equalizing. The old system of the foundation program plan gave deliberate advantage, **inter alia**, to districts of rich households. This, after all, is what *Serrano* is all about. These rich households were looked upon to set expenditure standards toward which the only-slightly-less-rich districts could look up to and so on down the chain of wealth. Can one any longer rely upon these districts of rich households to set high expenditure standards as they have in the past? I fear not. Consider the case of Beverly Hills. The town is inhabited by households of moderate age – otherwise one cannot expect such a clustering of richness. Even among households with school age children, one finds a certain proportion that makes use of private schools. It follows that the number of Beverly Hills' residents with children in the public schools is a minority. Will the majority be willing to spend at uncommonly high levels in schools when to do so they must place upon themselves the highest tax rate in the state? I think not.

It is quite difficult to imagine what would happen to expenditure levels if a family power equalizing scheme were to be adopted. Households would be in a position of selecting among a range of price options in education much as they select among a range of price options in buying, say, an automobile. There is one peculiarity added, however: the price one would pay for education of a given quality would rise not only through the force of inflation but as one's own income rose. Income elasticity of demand for educational services would need to be quite high if such a price system could sustain a secular advance in level of education spending per student.

III. The Issue of Household Choice.

It is reasonable to say that many people in this country would like to exercise a greater degree of choice about the types of educational services they consume than presently they are able to do. The resident of a poor neighborhood in the inner city faces a compulsory attendance law in schooling such that he has no choice but to enroll his child in the single school of his given attendance area. This school may be an institution in which a majority of the students are failing abjectly in their studies and in which a substantial minority are on hard drugs. The resident may justifiably feel that the law of the land demands he "kill his child." At the same time, numbers of suburban students find the school atmosphere rigid and intellectually stultifying and seek to enroll themselves in the new breed of "alternative schools."

It seems to me that choice in education carries a price. The price posed by family power equalizing is stratification of schools on racial, ethnic, and political grounds. Either this is the real price or family power equalizing is not providing the degree of choice its advocates claim for it. I believe the price in this instance is too high.

I think what we need to find is means of choice within the public sector, where the price can be limited to a student's being willing to invest extra time and effort to achieve a more stimulating atmosphere and to have the opportunity to engage himself in special studies. The regional authorities mentioned above would be well suited to provide supplementary services at least in the afternoons, evenings, weekends, and summers. These services could be regulated mainly by student demand. Since the regional institutions would serve a large number of students, economies of scale would allow highly specialized courses to be offered.

I do not suggest this, of course, to be a proper solution for the aggrieved parent of the inner city. On this problem, I support the approach of yet-to-be-passed bills in the California Legislature which would provide to the parent of a child in any inner-city school that was failing to meet acceptable academic standards, a substantial amount of money to find an alternative educational program for his child, either in the public or the private sector. Here the price of choice is public dollars drawn from us who can best afford to give them. We have not yet reached the financial threshold of effective education in the inner city and this should be our first priority.

ALTERNATIVE FINANCIAL STRUCTURES FOR OREGON PUBLIC EDUCATION

Richard A. Munn

The panel member's function will be to relate Professor Benson's remarks to the Oregon situation. We have agreed on dissecting Professor Benson's paper into three components. I have agreed to give an overview of Oregon's current method of funding primary and secondary education. I will then attempt to discuss the alternative revenue sources for financing education.

Oregon's method of funding education in broad terms is not dissimilar to many other states. Elementary and secondary education receives its revenue from three different levels of government – state, local and federal. In 1970-71, approximately 18.9 percent of $96 million in revenues came from state sources, 4.3 percent or $22 million in revenues came from federal sources, 64.0 percent or $325 million came from local property tax sources, and 12.8 percent or $65 million in revenues came from other revenue sources. Oregon is one of the lowest contributors of state funds to primary and secondary education. The "other revenue" sources are composed of such things as school lunches, property sales, tuition and investment earnings. Thus, in 1970-71, total receipts amounted to $508 million for the operation of primary and secondary education. We'll get back to that figure and project it into the next biennium to give you an idea of the magnitude of the problem if you're going to change school funding.

Oregon's school finance sounds very simple when one compares these four revenue sources. But let me not mislead you. School finance in Oregon is a complex and confusing process to most Oregonians – including legislators and educators. Let me illustrate how complex school finance is by reviewing the specific sources of state support and the local property tax funds. The state's basic school support funds – amounting to $89 million in 1970-71 – can be divided into three accounts:

1. School transportation fund
2. School growth fund
3. And a foundation program

The foundation program is split into two categories:

(a) State flat grants which make up about 81.5 percent of the money available in the foundation program in 1970-71.
(b) An equalization fund which makes up 18.5 percent of the money available in the foundation program in 1970-71.

I will not bore you with the equalization formula itself. It is Oregon's counterpart to the Reform of Foundation Program Plan as mentioned by Professor Benson without the reform.

Besides basic school support, there is the common school fund. This amounts to $1.3 million in 1970-71, or about $2 per census child.

Finally, the state makes a biennial series of appropriations for specific programs, such as the handicapped, mentally retarded, gifted, disadvantaged, etc.

On the local side, there are three major sources of tax revenues:

1. There is the county school fund. The county is authorized through the county school fund to levy a small property tax and it also receives federal forest funds in those counties where they have federal forests. This amounts to approximately $14 million, about $7 million from forest fees and $7 million from property tax in 1970-71.

2. The Intermediate Education District is authorized to levy a property tax which is subject to the six percent constitutional limitation. The levy provides funds for the operation of the IED offices, funds for distressed districts, and funds for equalization. The equalization funds go to the district on an ADM basis.

3. The third source of local revenues is the local district property tax levies. Because few school districts have realistic bases, they must have levies approved annually in excess of the six percent limitation. For most school districts, the property tax levies approved by the voters annually represent the major source of school funds in Oregon.

To the average citizen, this complex system of state and local funding seems unnecessary. He might be faced with voting on IED levies, on Union High levies, and on an elementary district levy. He also might be faced with an election on a bond issue by the Union High or elementary district.

Finally, the voter is often told that if he does not approve a state tax change, it will affect his school resources through the basic school support program. I would think the system might soon fall through voter frustration if the courts do not stimulate a change.

I am sure the brief and somewhat sketchy description of the Oregon method of financing primary and secondary education does not reveal anything new to most of you. But I think we must have a common understanding of where we are to intelligently discuss change.

If one assumes the *Serrano* principle will prevail in Oregon, whatever that principle is after this morning, what are the alternative sources of revenue to finance education? Before we investigate the revenue sources, let us briefly look at school costs. We said on the revenue side we had $503 million coming in and that same year (1970-71) we spent $531 million There was a cash carry over is the reason for the difference here: of this $418 million was spent on current operations. Capital outlays amounted to $80 million. The other programs included school lunches, student body activities, community service, etc. If one projects ADM and the cost per ADM to 1973-74, and try to project those costs using a flat rate projection of 6 percent, it is estimated that current expenditures will amount to $455 million. This would cover the operating costs of schools. This does not include transportation costs, capital outlays, and debt service. Let us assume that this would be a minimum cost figure if the state assumes the financial burden of primary and secondary education. If we assume the existing source of state revenues would remain at the current level, then the cost would be reduced from $455 million to $336 million. What are the alternative revenue sources available that might provide $336 million? How could this quantity of funds be raised? It is common to hear citizens suggest that a personal income tax increase should be used to fund education. It would take a 13 percent point increase in each rate to yield $336 million. This would mean that the rate would have to move from the present 4 percent to 10 percent to 14 percent to 20 percent. Oregon is the third highest per capita income tax state now; that would put us up near the federal tax rate and there wouldn't be anyone close to us.

If you find that undesirable, how about a net receipts tax? It would only take a rate of between 4 to 5 percent to yield the $336 million Remember that would be on your adjusted gross income – that's before exemptions and deductions.

If you are one of the few in favor of sales tax, it would only take a rate of about 8 to 9 percent if we used the California sales tax model.

	Estimated Revenue (millions)	
	1973-74	1974-75
Personal Income		
Capital gains (taxed as ordinary)	$ 6-8	$ 6-8
1% effective rate	36	37
Federal tax deduction	56	57
10% surtax	28	31
1% net receipts tax	74	77
1% wage tax (individuals)	61	64
Sales Tax		
1% (food and drugs exempt)	41	43
1% broad base	49	51
1% value added	72	76
Property Tax		
1% land tax ($10/$1,000 TCV)	59	63
1% statewide property tax ($10/$1,000 TCV)	235	254
1% statewide property tax except owner-occupied homes ($10/$1,000 TCV)	141	152
Selected Excise Taxes		
1 cent cigarette tax	3.1	3.1
1 cent soft drink	6	6
A. (see attached list)		
5% hotel-motel tax	3	3.1
Lottery (New Jersey type)	8-10	8-10
Corporation		
1% increase in rate	7	7
Offset eliminated	3	3
Increase minimum to $100	.5	.5
Employer Payroll Tax – 1%	49	51
Estimated Payment (one-time pickup)		
Personal	16	16
Corporation	18	18

Maybe you have caught on to the national fad and favor a value added tax. This would yield the $336 million with a rate of 4 to 5 percent.

How about business picking up the whole cost of education? An employer payroll tax would do the trick at a rate of 7 percent. The corporation excise tax only yields about $7 million per 1 percent rate, and we now have a 6 percent rate on most corporations and an 8 percent rate on financial institutions so it could not possibly do the job.

Even though everyone wants property tax relief – business and homeowners – let us turn reluctantly to this source of revenue. If a statewide property tax was levied on all classes of property, the rate would have to be $14.30/$1,000 true cash value to yield $336 million in 1973-74. By the way the average in the state now is about $18 per $1000 for total school cost and we're dealing again with just current expenditures. There are 78 districts which levy less than $15/1,000 true cash value. School District No. 1 in Portland is included among these 78 districts. I do not believe that it would be politically feasible to propose a tax program which causes an increase in property taxes on Portland homeowners.

I hope I have made my point that there is no simple single tax change that could be made to raise this amount of revenue. The only one that comes close is the property tax that we've suggested here. It is obvious that a combination of taxes must be used to raise this amount of revenue. But what tax combination? If we can agree on some basic assumptions the task will not be so difficult.

We could agree:

1. That the principle as set down in the *Serrano* case is most likely to be adopted in Oregon.
2. The property tax is too productive a revenue source to abandon entirely.
3. If it is to have any chance of passage by the legislature and the people, any tax proposal must minimize the shift between income-producing property and non-income-producing property.

It seems to me in Oregon because of the emergency clause, because of the initiative and referendum, we really have two different levels of consciousness. We have a level of consciousness within the legislature and in many aspects that's different from the public level of consciousness at large. To get a tax measure passed in Oregon you have to find something that's going to be compatible in those two different levels of consciousness. I think the public reacts to a self-calculation of their tax: the legislature is concerned with that but often reacts to pressure groups besides.

Let us take the last assumption first. By minimizing the shift between income-producing property and nonincome-producing property, we would have generating approximately 50 percent of the revenue from business and 50 percent of the revenue from individuals.

There are very few methods of raising sizable amounts of money from businesses. We could impose a value added tax, a payroll tax, doubling to tripling of the corporation excise tax rates, or a statewide property tax on nonresidential income-producing property. The value added tax seems impractical and difficult for a state to impose. A doubling or tripling of the corporation excise tax rates would be unfair. Thus, we are left with a statewide levy on income-producing property and an employer payroll tax. To reduce the tax shift between types of businesses, a combination of these two taxes would seem to be the fairest.

To balance this tax, we would need to tax individuals directly. Our methods of raising sizable amounts of revenue from individuals are limited to some form of a personal income tax change, general retail sales tax, a variety of selected excise taxes, like cigarette, gasoline, soft drink, beer, or a residential property tax.

A residential property tax would not be feasible for political reasons. A general retail sales tax would be politically difficult, if not impossible, to sell to the legislature and the people. An eight to one defeat is hard to forget. A large variety of selected excise taxes would be subject to the same argument as the sales tax. We are left with some form of a personal income tax change. Of all the changes that are possible with the personal income tax, I would suggest three alternatives. One alternative would be a change in the rates and rate brackets. A second alternative would be to adjust the rates and eliminate the federal tax deduction. The elimination of the federal tax deduction would significantly increase the progressivity of the personal income tax. This deduction is of much greater benefit to the high-income taxpayer than the low and middle-income taxpayer. A third alternative would be the overhaul of the personal income tax law. Such things might be considered as elimination of all itemized deductions and giving everyone a standard deduction personal exemption credit rather than the dollar allowance, federal tax deduction elimination, rate and bracket changes.

Furthermore, to be politically acceptable to the public, some form of homeowner property tax relief is needed. As most of you are aware, property tax relief has been a major political issue in Oregon for at least the last 8 to 10 years. Finally, I would suggest that a property tax limitation, at least on school funding, would also be a political necessity. The people will need to be assured that further finance responsibility for the funding of education will not rest mainly on the property tax.

Let me now put this tax package together:

First, 50 percent of the revenue would need to come from some form of tax on business. I conclude that a combination of a statewide property tax on income-producing property and a payroll tax would appear to be the most feasible.

Secondly, 50 percent of the revenue would need to come from individuals. I conclude that a change in the personal income tax would be the most practical. Thirdly, I suggested that sizable homeowner property tax relief and a school property tax limitation would be needed to round out the tax package. If you have not guessed yet, this tax package is basically that announced by Governor McCall on March 28, 1972.

There are many details that must be worked out on the Governor's program. My colleagues and I at the Research Section of the Department of Revenue, and a host of other research personnel in state government are in the process of doing just that. We are engaged in analyzing the full effects of the Governor's school finance program so the Governor's staff and the legislature will be able to fully evaluate the proposal and hopefully, find acceptable solutions to any problems that might arise.

SERRANO, THE OREGON LEGISLATURE, THE GOVERNOR'S PROPOSAL, THE ALTERNATIVES AND THE DILEMMA

Senator Jason Boe

The word *Serrano* is destined to become far more than a mere proper noun. Even now the word evokes a concept of such dramatic importance to the individual states of the union that the structure of school finance will never again be the same.

We are privileged to have heard from both Professor Coons and Professor Benson today, for they are both pre-eminent national authorities in the matter of *Serrano*. And yet, it falls to me today to speak for those – both in Oregon and the nation – who will bear the ultimate responsibility for the fearful task of revolutionizing our laws regarding the financing of education. These are the state legislators of the fifty states.

I use the term "revolutionize" deliberately for the word itself means "to change drastically and completely the affairs or ideas of government." And that, of course, is exactly what *Serrano* means in the field of educational finance. The wonder of the matter is not that the courts have decreed as they did in this case, the wonder is that it wasn't done long ago. But the ultimate solution – good or bad – will be accomplished by the men and women of the state legislatures. And a more challenging task has never confronted these legislative bodies. How we react to this challenge will, in my opinion, determine not only the viability but also the credibility of our federal-state system. For make no mistake about it, if we cannot come to grips with the opportunities of *Serrano* on the state legislative level, the federal government will be forced to step in and make these decisions for us. And if that happens the need for the state legislature will be measurably diminished and possibly extinguished.

For those of us who believe that the state legislatures must be strenghtened and must reclaim their co-equal status with the federal government, *Serrano* does not constitute a threat. It presents a fantastic opportunity – an unparalleled opportunity for innovation and for creativity.

And that is exactly how we in Oregon plan to meet the challenge of *Serrano*.

Let us now examine some of the proposals, the pitfalls and the possibilities that present themselves to those of us in the legislative branch of state government with regard to the restructuring of school finance.

Governor McCall has recently made public his initial response to the implications of *Serrano*. But before we begin with an in-depth analysis of the Governor's program, let me outline for you some of the quirks and peculiarities of Oregon tax laws.

Oregon was the first state in the union to adopt the initiative and referendum system. And while every other state has followed Oregon's lead and adopted their own systems of initiative and referendum, only Oregon, through its constitution, has the proviso that no new taxation measure passed by the legislature shall go into effect until 90 days after the legislature has adjourned **sine die**. This, of course, is to give the people at least 90 days (but often longer) to circulate petitions referring the proposed tax measure to the people for a popular vote. In 1963 a comprehensive reform of the Oregon income tax was passed by the legislature, referred by the people and defeated in a special election by a 3 to 1 vote. In 1969 the legislature passed an ineptly conceived sales tax program for the purposes of property tax relief. (I can call it "inept" with some justification since I voted and campaigned against it!) The legislature referred it to the people and it was defeated by a vote of eight to one in the greatest defeat any statewide tax proposal has ever received in Oregon. In 1971 the legislature passed a bill providing for a five cent a pack increase in the cigarette tax. It was referred by the people (with the help of the cigarette industry both from within and without Oregon) and was passed but with a razor thin margin of less than 10,000 votes. As a matter of fact, the two cigarette tax measures are the only tax measures to pass a statewide election in many, many years.

State government has only three principle means of raising revenue: 1. the income tax, 2. the property tax, 3. the sales tax. Oregonians, to understate the case, are not wild about a sales tax and have voted against that form of taxation at least five times, most recently in 1969. If we accept the premise that at least for the foreseeable future the sales tax is a dead issue, that leaves us with the two remaining tax forms: the property tax and the income tax. Again, if we accept a further premise that the property tax is at its maximum or at least very near its zenith in terms of public acceptance, then that leaves us with only the income tax as our ultimate tool with which to proceed on the road to restructuring school finances.

Thus Oregon is presently in the position of having fairly high property taxes, a relatively high state income tax (third highest in the nation) and no sales tax.

How do we get property tax reform out of this? Mr. Richard Munn, a fellow respondent who works with the Research Division of our Department of Revenue, has outlined most of the viable alternatives available to the legislature. With the background he has provided and that I will provide now, let's examine Governor McCall's proposed tax program.

The Governor has proposed massive changes in the structuring of the property tax and the income tax. Here are the basic mechanics of the proposal:

1. The state would set the annual foundation grants for education as follows: $869 for each elementary school child, $1,129 for each high school student. Provision would be made for individual districts to exceed the foundation grant subject to appropriate limitations.

2. The state would assume responsibility for the costs of transportation and capital construction as well as debt service on existing debt.

3. Income-producing properties would pay the only property tax going into the foundation grants for school operations. This property tax would be uniform statewide and amount to $10.25 per $1000 true cash value. This would generate $87 million annually.

4. Employers would contribute a payroll tax of 1 percent. This tax on business would bring in about $50 million each year with the obvious incremental increase if employment or wage levels were increased.

5. A restructuring of the Oregon Income Tax by raising the personal income graduated scale from the present 4 to 10% range to 4 to 13%. He also proposes that the conversion of the personal income tax exemption of $675 be changed to a $27 tax credit. This, of course, is an increase in the Oregon Income Tax structure for most citizens. For example, a person in the 4% income tax bracket (the lowest we have) under present law already gets a $27 exemption per dependent (4% x $675 = $27.) A person in the 10% bracket presently receives a $67.50 exemption per dependent (10% x $675 = $67.50.) $67.50 –$27 equals a $40.50 tax increase for individuals in present highest bracket. Thus, the proposed change in this area

modifies exemption taxation from its present inequities and changes the exemption law to one that is extremely progressive. These provisions would raise $136 million per year.

6. An income tax credit plan would provide tax relief for the renters of homes or apartments.

7. Personal property taxes, including the inventory tax, would be repealed and eliminated.

8. The statewide property tax on income producing properties would be accompanied by a statewide property tax limitation of 1¼% of true cash value. This means that constitutionally the property tax for education could only increase from the proposed initial $10.25 per $1000 TCV to a maximum of $12.50 per $1000 TCV. This would give some assurance to voters that future increases in the operational costs of schools would primarily be carried by state or federal resources and not the property tax. It will raise $87 million in the first year of the program and $93 million the second year.

9. In addition to the three main avenues of the revenue raising program, the Governor anticipates that federal revenue sharing will shortly be implemented by the Congress retroactive to January 1, 1972, and that this would provide Oregon with $90 million by the end of the 1974-75 fiscal year.

This, then, is a reasonable portrait of the Governor's proposal. And he is to be complimented for making this effort. He sees very clearly that the fiscal course of the state must be altered and he is doing his best to achieve the significant property tax reform demanded by *Serrano*. However, while the Governor may propose, it is the legislature which must dispose, so we will now turn to an analysis of his program.

First, let's identify the favorable aspects of the proposal. To a rather remarkable degree Governor McCall has adapted his program to minimize the property tax shift which so easily can occur between income producing properties and residentially occupied homes. It can fairly be stated that if there is an inequitable shift, there "ain't no gift!" In Oregon as in most states, the ratio in property taxes has been this: income producing properties pay two-thirds (2/3) of the total bill while owner occupied residences and farmsteads pay one-third (1/3) the total. There is recent evidence that this ratio is shifting more and more to homes and farmsteads. If, then, we adopted a plan to use other revenue to substitute for property tax revenue we would be relieving income producing properties of approximately two-thirds (2/3) of the load and homeowners would receive relief of only one-third (1/3). For example, if the revenue from a retail sales and use tax were to be dedicated to across-the-board property tax relief, we would need to know what the "shift" would be.

A 3% sales tax in Oregon, for example, would generate approximately $100 million per year. Income producing properties would pay about 25% or $25 million per year in sales taxes. The individual tax payers would pay the balance of $75 million per year. When these revenues were distributed, however, to the various classes of property, the homeowners of Oregon would receive only $33 million a year in property tax relief while income producing properties would receive $67 million a year in relief. For $25 million paid in sales and use taxes, income producing properties would receive $67 million in relief, a net gain of some $42 million per year. While the average tax payer through his purchases would be contributing $75 million a year, the homeowners would be getting back only $33 million a year in property tax relief. By any measurement this would be an inequitable and unacceptable proposal for the homeowners of Oregon, and is a classic example in point of what is meant by a shift in taxation.

The Governor's plan of using only income producing property as the source of educational revenue from a statewide property tax is an innovative and exciting new concept in the field of property taxation. So far as I know, no other state has used this approach to smooth out the hills and the valleys of the inherent shifts which inevitably occur when massive property tax reform is attempted. Let me be clear when I say that no significant tax reform can be accomplished without some shifts occurring. But how those shifts are handled, acknowledged and managed is of primary importance in seeking broad public support for tax reform. The use of this statewide property tax vehicle may even work to attract certain industries to Oregon, since insofar as property taxes are concerned it will make little difference where they locate. As it now stands, industry often locates where property taxes are the cheapest. The plan calls for the state to assume all the costs of primary and secondary education thus eliminating the major need for any so-called equalization formulae. It also gives to the state the obligation of paying for transportation, school construction costs and the debt service on those costs. Laudable aims, all!

But let us look at some of the very real problems which occur. As chairman of the Sub-committee on School Finance of the Legislative Interim Committee on Taxation, my committee is adopting an attitude of cautious optimism toward the Governor's program. And even now we have called for exhaustive computer runs that will show the impact of the program on each school district within Oregon as well as computer profiles that will give us an in-depth analysis of the impact upon all classes of individual taxpayers from small incomes to the very highest earnings in our state. With this data at hand, the legislature will be able to more adequately ascertain what the shifts are and where they occur.

For the present, however, we will confine ourselves to problems we see now. In the interests of time and space let's take the various points of the Governor's program that we have listed previously and comment on them.

1. The statewide foundation program of $869 and $1129 for elementary and secondary students respectively.

These figures of $869 and $1129 were evidently developed by computing the actual costs of primary and secondary education across the state and taking the statistical average of these costs. This means, of course, that some school districts have costs which are already higher than the foundation program and some have educational expenses which are lower than the governor's proposal.

This presents two immediate problems:

A. Will the state demand a reduction in the programs of those districts which exceed the foundation? Or, in the event that a program is devised for an individual district to offer an enriched program of education, what will be the source of revenue for the enriched program? Surely, in the light of *Serrano,* the property tax source could not be used to allow a district to have an enriched program over and above that of another district! Or could it? A recent paper by the Lawyer's Committee for Civil Rights Under Law suggests at least ten possible valid bases for spending different amounts upon different pupils. These are:

1. Level of tax effort of the child's district
2. Intellectual gifts of the child
3. Educational disadvantages
4. Age differences
5. Curriculum differences
6. Area cost differences
7. Municipal overburden
8. Transportation needs
9. Compensation for prior economic discrimination
10. Experimentation

B. Even more difficult it seems to me is the problem of the local school district which is presently spending several hundred dollars per pupil less than the foundation program proposed. For example the Salem School District, second largest school district in Oregon, is currently spending $865 per year per high school student. This is $264 less per student than the proposed $1129 foundation program. How do they spend this "extra" money when the majority of voters within the district are satisfied that their present expenditures are already providing an adequate educational program? Also, what about the economies that are inherent in a large school over that of a small school? In High School X with 2,000 students, a well equipped and staffed chemistry laboratory can be kept busy and heavily occupied seven periods a day while in High School Y with 400 students a similar chemistry lab is used only two periods a day by relatively few students. Obviously the unit cost for chemistry is much less at X than it is at Y.

Let's consider the following table to illustrate a point. The statistics were obtained from the Oregon State Department of Education.

This table illustrates what I term the "Large School System Economy Factor." The school districts were chosen completely at random and only by their relative size. None of the "small" school districts are "special situation" districts.

The table illustrates the danger in predicating good education on dollars alone. For example, the largest school districts can offer 70 or 80 electives to their students; the average size district, maybe 30 or 40 electives, while the small district can only offer 8 or 10 electives. And yet the larger school districts can offer these enriched programs at a pupil cost substantially less than the average or small school district. Surely the number and variety of elective subjects in a school is as valid a criterion of the enrichment of a district's program as is the mere number of dollars spent per pupil. No one can reasonably argue that the small school districts at an average per pupil cost of $1012 are offering as varied or enriched a program as are the larger districts at an average cost of only $861 per pupil.

The Governor's program gives us no directive to the solution of this problem. To say that providing an arbitrary $869 or $1129 per pupil will bring about "equal educational opportunity" in Oregon does not square with the facts. Nor does it appear to square with *Serrano.*

This "large school economy factor" as well as many of the previously listed ten factors identified by the Lawyers Committee are unanswered in the Governor's proposed tax program. We cannot at the legislative level accept an educational finance program that would encourage spending merely for the sake of spending. Somewhere there must be an incentive for a local district to practice economy and restraint while still providing the best possible educational program. Public funds must not be spent simply

TOTAL CURRENT OPERATING COSTS PER PUPIL, 1970-71

Grades One Through Twelve

DISTRICT		
Portland	$ 877	The Six Largest School Districts in Oregon Average Total Operating Costs = $861/pupil
Eugene	$ 965	
Beaverton	$ 917	
Springfield	$ 873	
Salem	$ 755	
Medford	$ 786	
Baker	$ 693	Six "Average" Size School Districts in Oregon Average Total Operating Costs = $896/pupil
Philomath	$ 861	
West Linn	$1011	
St. Helens	$ 862	
Phoenix	$ 819	
Chenowith	$1128	
Alsea	$ 903	Six Small School Districts in Oregon Average Total Operating Costs = $1012/pupil
Powers	$1112	
Camas Valley	$ 983	
Dayville	$ 890	
Harper	$1112	
Perrydale	$1051	

because they are available. There must be strict accountability for the use of these funds.

2. **The state will assume responsibility for the cost of capital construction and debt service on existing debt.**

This will be an extremely difficult concept for the legislature to accept. Let me share with you some of our problems.

In the first place, the building of the physical plant for a school has a more direct relationship to local property taxes than does the educational program. In other words the fact that a new attractive school plant is built in a town or a neighborhood has a definite relationship to the value of property in that town or neighborhood. It is of little relative value to a property owner in Portland that a fine new school building is built in Klamath Falls or vice versa. Conversely, the **educational programs** of our school systems are of statewide importance, because the student educated in any given city, for example, will likely become an adult citizen who lives in another city of the state (or another state which argues persuasively for more federal aid to education) and the quality of his education will bring benefits to the city where he makes his adult home.

This concept could also lead to great "pork barrel" problems within the legislature. Obviously, we couldn't commence all the needed building programs at once, and the problem of who gets what and when could become a real problem within the legislature. And the possibility of the executive or legislative branches of government using the school building program for unfair political advantage is very real. Then there is the problem of the credit rating of the state. Due to the size of the bonding program needed to build new schools, the state of Oregon would have to pledge its wealth as a security for the loans. Only the bonding attorneys and money lending institutions could tell if the state of Oregon's bond rating, presently triple A, would lower significantly, but the chances are it would. And if it did, all units of government in Oregon might pay significantly higher interest rates on their bonds than they do presently.

3. **Income producing properties would pay the only property tax going into the foundation grants for school operations.**

One of the problems we encounter here is that of definitions. It will be extremely difficult to define income producing properties. Perhaps the best approach might be to define statutorily those properties which are **not** income producing properties. But even then it will be difficult. There are both some obvious and some subtle tax shifts in this portion of the program.

Still, as I stated earlier this is one of the salutory new ideas in the Governor's program and it will receive exhaustive study.

4. Employers would contribute a payroll tax of one percent.

The Governor's plan for a payroll tax will result in an obvious shift in tax burden from those industries which have a large investment in plant equipment to those which have a relatively high labor cost. One of the ramifications would seem to be that the so-called "clean industries" such as electronics, insurance companies, certain light manufacturing, etc., would have an increased tax burden and it may possibly make it more difficult for these types of industries to be attracted into the state. In the past, both the Governor and most members of the legislature have stated this to be one of our objectives.

5. A restructuring of the personal Oregon Income Tax graduated scale from the present 4 to 10% range to a 4 to 13% range.

This is an attempt to make the Oregon income tax even more progressive than it is presently. The income tax in Oregon is quite elastic already. Consider the fact that even with the inflation and growth of the past two decades, Oregon has not raised its income tax since 1957 and, in actuality, we have inadvertently lowered state income taxes several times within that period. This fact is relatively unknown by the general public and generally unappreciated by them.

Oregon will raise about $275 million by means of the graduated income tax and corporate exicse tax this fiscal year. The Governor's proposal would increase the total income tax by $136 million a year.

The Governor's income tax proposal, when consolidated, would result in an increase of approximately 45% in the effective personal income tax.

At the present time, Oregon ranks approximately third in the nation in its reliance upon income taxes. An increase of this magnitude in effective rates would undoubtedly make Oregon No. 1 in the nation. Whether or not this would have any effect upon the state's ability to attract new industries or to attract industrial executives or professional persons such as lawyers or health care personnel, is unknown. What is known beyond peradventure of any doubt, is that the opponents of the plan will use this argument heavily.

6. An income tax credit plan to provide relief for renters of homes and apartments.

No argument here. It is right and just that renters receive tax relief. The legislative mechanics for providing this relief are not difficult and the concept must be included in any plan for property tax relief.

7. Personal property taxes including the inventory tax would be repealed and eliminated.

Embodied in this part of the proposal are some of the great unknowns of the entire proposal. Only a detailed computer analysis will show us what the tax shifts are and where they occur. This analysis is being done now.

Consider this: if you eliminate personal property and inventory taxes, you are relieving them on both the educational portion of the present property tax as well as on the local government portion of those taxes. **In order for cities, counties, ports, hospitals, sewer districts and all other special service districts to merely maintain their present levels of revenue they will automatically have to raise their millage rates to compensate for their loss of revenue from personal property and inventory taxes!** So some of the property tax relief provided by the plan will be used up before it is ever received by the property tax payer. And this without helping in any manner the excruciating plight of our municipalities, counties, and other local governments. It even exacerbates their problems.

This shift will vary greatly in each district depending on how much personal property or inventory is in the district. The city of Portland has a great deal of inventory and personal property while many other Oregon communities have relatively little. The potential for an unfair tax shift is high between businesses which have large inventories and high personal property obligations and those businesses which have few. Likewise, the potential for a shift onto the homeowners of Oregon from those same businesses which have high inventory and personal property values is also high.

Thus, businesses and industries which have these high valuations of personal property and inventory may well be benefiting more than they should at the expense of other businesses and the homeowners under the Governor's plan.

Hopefully, however, there are solutions to this dilemma. We can give personal property and inventory a partial exemption, no exemption, or we can give it full exemption and levy another substitute tax on those portions of the assessed valuations of which we are speaking and thus achieve equity and not add to the already overwhelming burdens of all municipal and many county governments.

8. A property tax limitation of 1¼% of true cash value on the statewide property tax on income producing properties used for educational financing.

The Governor rightfully feels there must be a limitation on the property tax used for educational purposes. Recall that his proposal asks for an initial levy of $10.25 per thousand dollarsTCV.A 1¼% constitutional limitation would put a ceiling of $12.50 per one thousand dollars TCV.

To do otherwise would give unlimited license for voters to keep piling the costs of education on property other than homes and would be unfair to all concerned.

I believe that in general the people do want and will demand this type of limitation on property taxes and Governor McCall is recognizing that demand. Obviously there are many other ways of imposing a limitation on property taxes and the one proposed may not be the best, but it does recognize the problem. The mechanics and nuances of the limitation are varied and the matter is being researched thoroughly by both the executive and legislative branches.

9. Federal revenue sharing will be implemented soon by the Congress and Oregon will receive $90 million as its share by the end of fiscal year 1974-75.

This appears to be one of the weaker suppositions of Governor McCall's plan. For too long, schools, cities and state governments have been promised massive financial aid from Washington, D.C. I am yet skeptical.

Our federal government ran one of the greatest deficits of all time – some $40 billion last year. How can a government that is so far out of balance have *anything* left over to *share* with state and local governments? It boggles the imagination! Perhaps it can happen when the current war effort ceases and defense spending lessens, but in view of current facts and the recently renewed offensives of the Viet Nam war, it doesn't appear likely to happen soon no matter how much we wish it. It is my opinion that Oregon must work out its own salvation without relying heavily on any anticipated munificence from our federal government.

If it happens–fine! Let's have the machinery set up to accept it and use it wisely and prudently. But let's have an Oregon solution ready that will meet and answer Oregon's needs now.

Governor McCall anticipates using the entire amount received by the state from federal revenue sharing from January 1, 1972, through June 30, 1975, during the 1973-75 biennial period. As a result, while the state is receiving approximately $25 million a year, his program provides for the use of $45 million per year. This will make it necessary to provide additional unidentified revenue to continue his program after June 30, 1975. Thus far, to my knowledge, neither the Governor nor his staff have publicly addressed themselves to this problem.

I must bring to your attention one other problem that exists. The last session of the Oregon legislature at long last recognized that for property tax purposes income producing property must be treated differently than owner occupied residential property. We passed and the Governor signed a series of bills which in effect said that the payment of homeowner property taxes must be correlated with a person's ability to pay. We appropriated some $40 million to pay for the benefits of this act. No matter what the age of a person, he is eligible for property tax relief if his income so qualifies him. We have estimated that fully one-third of all Oregon homeowners can qualify for substantial property tax relief. The lower the income, the higher the percentage of relief. It is a nationally unique and innovative plan.

Governor McCall's proposal calls for the elimination of the funding for this program and the incorporation of these funds into his own plan.

Many very low income persons throughout Oregon are far better off under the present plan of property tax relief than they would be with the Governor's plan. But especially is this true for these citizens in the city of Portland.

Portland, due to the problems common to all major cities, levies approximately 50% of its total property tax for the support of education and the other 50% for municipal, county and special service districts. Most other areas of Oregon which do not have the unavoidable municipal overburden of Portland, levy between 70 and 80% of their property tax dollar for the support of education and the balance for all other local government services.

If homeowner property taxes for educational purposes are eliminated, Portland's relief will be 50% against a state-wide average of 75% relief for the balance of the state. Proportionately then, many more of Portland's low income property tax payers would be much better off with the present law conceived by the legislature than they would under the Governor's proposed plan. Some of the general fund money designated for this plan must, in my opinion, remain available to take care of those who would suffer most if their property taxes were to be raised to a higher level than they are presently paying. We will not know how many millions of dollars will be needed for this until some time after the April 15th deadline for application to this program has passed. Other portions of this fund might be used to restore more equity to the taxpayers of Portland in the form of additional grants to the model school program.

In conclusion, let me say that I do not wish to appear as an antagonist to Governor McCall's program. I am not. But in our tri-partite form of government the legislature is responsible for presenting the solution to the public, the ultimate judge and jury. It is an integral part of our system of checks and balances. The Governor is to be commended for his courage and devotion to duty in proposing a new and unique system for the financing of education. The legislative duty is also clear; it is to question, to provide alternatives and to produce solutions, not in a spirit of unhealthy partisanship but in a spirit of partnership that will provide the solutions we need for the best educational program we can provide. I am confident that Governor McCall shares this basic philosophy. I am further convinced that the enormity and gravity of the situation will demand the closest possible cooperation between the Governor and the legislature.

While the courts through *Serrano* are demanding equity in school financing, parents and concerned citizens are demanding excellence in the educational program. And excellence is more than expenditures and pupil-teacher ratios; it requires effective measurement of the results of education and fast corrective steps when weaknesses are found.

If we do not achieve property tax reform it is inevitable – really only a matter of time – that the property tax will be repealed, if not totally, at least partially. It will be repealed either by the voters who reject the levels of property tax we must attain to support education or it will be repealed by people who recognize that in a changing economy the over-taxation of one particular form of wealth while allowing other forms of wealth to escape taxation is so utterly discriminatory between citizens as to be totally unacceptable.

The question of local control is constantly in, with and under any discussion of a totally state-financed educational program. It might well be we will find that once the local school boards, teachers and administrators are liberated from the necessity of "selling" operational budgets, serial levies and tax rate increases to the public, that they will be in a better position to concentrate their efforts on the true interests of local control – namely the **quality** of education that is provided for the children of their responsibility.

Education today is a highly explosive bomb. The property tax revolt – relatively timid up to this point – may well turn into a property tax revolution with the resultant chaos that is endemic with any revolution.

It is a bomb whose strength is unknown but by any standard of measurement it is immensely powerful.

Serrano has lit the fuse on this bomb, but how long is the fuse? That is the question: not "will the bomb explode?" but "**when** will it explode?"

I believe the fuse is short, particularly if major property tax reforms are not initiated and accomplished early in the next session of the legislature.

And that is why our sense of urgency is so great. There are many questions to ask and to answer, many hard decisions to be made. I am confident these decisions will be made by a legislature which recognizes the terrible seriousness of the situation and will rise to meet the greatest challenge ever presented to it.

We are grateful to the sponsors of this conference for their help in bringing this vital matter to the attention of Oregon and for aiding in its articulation.

EQUALITY, QUALITY AND HOUSEHOLD CHOICE–AN OREGON SCHOOLMAN'S REACTION TO CHARLES S. BENSON'S PERSPECTIVES ON SERRANO AND STATE LEGISLATURES

John Edmundson

Oregon prides itself in being pragmatic and progressive in all aspects of its public life. For example, the Oregon primary election pattern is a model which may guide the eventual structuring of a national direct primary, a much needed reform of our present system for determining the nominees for our nation's highest offices. Oregon has lead the way regarding improved governmental practices for income taxation, property assessment, environmental protection and a host of other important reforms.

However, *Serrano* is causing Oregonians to face one situation in which the state has been neither practical nor forward looking. The state system for financing public education is a confusing mess which we must now untangle and knit into a rational and equitable system designed to give every girl and boy an opportunity for adequate and appropriate schooling. We must weave a new cloth which covers not only our youth's schooling, but also provides justice and equity for the state's citizens who pay the cost of schooling.

State Superintendent of Public Instruction, Dale Parnell, stated the issue very forcefully in his testimony before the Legislative Interim Committee on Education last October when he said,

> The voter is entirely justified in his confusion. He has been permitted to believe that Oregon has a uniform system of financing schools and that this system will result in some equality of expenditure level and equality of tax effort necessary to maintain that expenditure level. He has further been permitted to believe that the organization of the schools is efficient from both an educational and a financial standpoint. The undesirable financial consequences of Oregon's district organization have not been adequately pointed out to the voter. I believe the truth of the matter is that Oregon is far removed from a uniform system of school finance and that instead of a single system, we have

> several systems that operate in different regions of the state. I further believe that this means Oregon does not have a 'uniform system of common schools' as called for in the Constitution – rather, it has a **non-system.**

The purpose of this paper is to translate Professor Benson's ideas into the Oregon context and explore the ways in which his suggestions may help Oregonians re-establish their reputation for pragmatism and progressiveness in the arena of school finance. This paper will attempt to convey an Oregon schoolman's reactions to the Benson proposals and consider some of their ramifications for the state.

Professor Benson characterizes the system of state-local financing of schooling as one of the most thoroughly worked out arrangements of intergovernmental relations in the country. In Oregon this is only partially true; there are glaring exceptions.

Under our present laws, three sources constitute a large portion of the states' school funds: the Basic School Support Fund, the Intermediate Education District (I.E.D.) Equalization Levy, and the County School Fund. Each fund is distributed to effect some degree of equalization; however, each is distributed by a different method. There is a limited measure of coordination between the Basic and the County School Fund distributions. There is no coordination between the Basic and the I.E.D. distributions and no coordination between the I.E.D. Levy and the County School Fund even though the tax for each is levied over approximately the same territory.

The lack of coordination between the equalization features of the Basic and the I.E.D. Levy leads to the anomaly of some school districts receiving equalization funds from the Basic which are in effect redistributed to other districts through operation of the I.E.D. Levy. The issues raised by *Serrano* will undoubtedly force a restructuring designed to remove this strange quirk in Oregon's "non-system."

The I.E.D. Levy is designed to achieve the laudible goal of equalizing tax burdens for education within the regional boundaries of the intermediate education districts which generally follow county lines. The tax-bearing capacities of Oregon's counties as measured by property wealth per pupil are quite variable. In 1968-69 the true cash value per pupil in average daily membership attending public schools in grades 1-12 ranged from a high of $110,159 in Sherman County to a low of $23,221 in Yamhill County for a ratio of almost 5 to 1 between the high and low figures. These wide differences in the property taxing capacities of counties make tax rate equalization within county regions rather illogical in the face of *Serrano*'s requirement that financing of schools must depend upon the wealth of the state as a whole. *Serrano* is forcing a rethinking of the relationships between state and local governments which hopefully will have the outcome of changing the effect of state action from serving to preserve unfair local advantages to one of creating and nurturing equity in the plan for financing the state school system.

Professor Benson states that, in general, foundation program plans for financing education depart from the intended ideal in three main respects. He first notes that the local contribution rate is typically set at a notably higher level than that which would be required to raise the costs of the foundation program in the richest district with the result of placing more of the costs of education on localities and less on the state. In Oregon the computational rate for determining state educational grants was close to ten mils in 1969-70. In that same year the total local millage levy in the state's 188 unified districts ranged from a high of 31.67 to a low of 4.63 for a high-low ratio of nearly 7 to 1. These data support Professor Benson's contention and further serve to emphasize the gross inequity that exists in the rates of property taxation for schools.

The second point Professor Benson makes is that the foundation program amount is generally far below the actual cost of basic education. In Oregon the 1970-71 foundation program level was under $500 per pupil; whereas, the operating cost in the state's unified districts was typically double the foundation program amount. In Oregon it is the case that school districts spend substantially more than the foundation program amount with the consequence that poor districts are forced to meet the extra expenditures at higher tax rates than are necessary in rich districts.

The third defect in foundation program plans specified by Professor Benson is the practice of giving a fixed, minimum grant per student to all districts without regard to affluence. In Oregon the flat grant distribution in 1970-71 was $128.14 per weighted average daily membership. The amount available for flat grants represented 81.5 percent of the total amount available for the foundation program. The allocation of the lion's share of the state foundation program monies to flat grants is largely attributable to the political power of the Portland School District which happens to be above the state average on property wealth per pupil and hence is not eligible for equalization grants.

In short, Oregon departs from the ideal foundation program in all three of the ways ennumerated by Professor Benson. These defects combine to produce the results that prompted the *Serrano* challenge in essentially the same fashion in Oregon as in California. Oregon's poor districts have to levy taxes at high local rates to finance modest school programs, while more affluent districts enjoy low school tax rates and enriched school programs.

Professor Benson points out that reduction of the number of school districts by consolidation serves to reduce inter-district differences in local taxable resources. The process of consolidation is underway in Oregon, but at an extremely slow rate. As of June, 1968 the number of independent school districts in Oregon was 367. At the present time this figure has come down to 345 of which 95 are districts with fewer than 100 pupils. The path of consolidation is part of the solution to the fiscal dilemma facing Oregon's schools; however, the public preference for local control by small community units makes consolidation a political basketball which gets passed around but seldom shot accurately through the hoop.

As an example, consider Linn County where the Millersburg Elementary School District with better than $200,000 true cash value per pupil and a tax rate under 7 mils is understandably disinterested in joining with nearby Lakeview Elementary School District which has less than one fourth the property wealth per pupil and a tax rate close to 10 mils. Surely the large manufacturing plants in the Millersburg School District contribute to the economic well being of most of Linn County and adjoining Benton County and probably the entire state. Statewide uniform taxation of income producing property for schools would seem to be a natural solution to the property wealth imbalances that exist in Oregon.

Citizens concerned about the financial support of schools in Oregon have through the years worked for the goal of 50 percent state support. Although sincere and hardworking in our efforts to achieve this long sought goal, we have been noteably unsuccessful in achieving it or even in moving toward a 50 percent state funding in recent years. According to the National Education Association's Research Division statistics, Oregon has declined in the estimated percent of revenue receipts for public elementary and secondary schools coming from the state government from 26.6 percent in 1964-65 to 19.6 percent in 1970-71, placing our state fourth from last among the states on this index of state level of fiscal support for schools. It is rather ironic that we are now seriously considering proposals for 100 percent funding of schools from state sources. Obviously a minor tune-up of the foundation program will not correct the rattle in our state school finance program's motor – a major overhaul is needed. Professor Benson's conclusion that reform of the foundation program plan is an unlikely prospect is clearly relevant to Oregon's situation.

The district power equalizing concept described by Professor Benson holds a great deal of promise as a means for restructuring Oregon's school finance plan. The basic premise of power equalization is that equal efforts in behalf of school support should generate equal resources. This basic premise is equity oriented, but there are certain questions which must be answered when considering power equalization.

First, what is the appropriate measure of effort? In Oregon the effort index has been the property tax rate. Under this index it would appear that property rich districts are making a relatively lesser effort in behalf of schools. However, in Oregon the so-called "rich" districts are mainly in the sparsely populated eastern portion of the state. Although property wealth per capita is high, personal income wealth is generally low. The result is that property taxes, though levied at relatively lower rates, are paid out of scarce dollars whose marginal utility for subsistance needs is in all likelihood substantially greater than that of the personal income spent on school taxes in the more heavily populated regions of the state which typically have greater per capita personal income wealth.

The question of effort index immediately gives rise to a second and related question, what is the appropriate measure of wealth? Professor Benson proposes that average income in school districts might serve as the measure of local wealth in the power equalizing formula. Income wealth is variable among regions, but not nearly so variable as property wealth. It was earlier noted that there is better than a 4 to 1 ratio between the high and low counties of Oregon on the per capita property wealth measure. The high-low ratio among the state's counties on the personal income wealth measure is just under 2 to 1. This lower level of variability makes the income measure of wealth a preferable standard.

Professor Benson has offered a second possibility for measuring local wealth. He suggests splitting the property tax role by taxing industrial and commercial properties on a statewide basis while leaving only residential property as the measure of local wealth. This suggestion merits careful study for several reasons.

The residential component of property wealth has the strongest relationship with the existence of pupils in comparison to the relationships of commercial, farm, industrial, personal, miscellaneous real, and utility components of property wealth to the presence of school age children. That is, homes and students are found in close proximity. The demand for educational services expressed in terms of pupil population has a direct relationship to the residential component of property wealth. However, the exact nature of the relationship needs to be determined. What are the patterns in residential property wealth and the incidence of pupils in the school districts across the state? What is the residential property wealth per pupil? What is the range of values in this variable? These and a host of other questions need to be answered.

Another reason for considering residential property separately from non-residential property for school finance purposes is that there would appear to be a strong possibility that residential property wealth and personal income wealth are closely related. It seems reasonable to expect to find that regions of high personal income are also regions of high residential property wealth. Well-to-do citizens may be expected to devote surplus dollars to the acquisition of premium housing. If this is true, then residential property could serve as an excellent proxy for the personal income measure of local wealth. This supposition needs to be checked.

A third reason for looking at residential property separately stems from the traditional way in which the total requirement for funding local schools has been met. Over the years, the amount available from non-local sources has been summed, then the local district determines and raises what is required to meet the balance needed for the local educational program. Our present crisis in school finance derives largely from the fact that the balance to be raised by local effort has come to be the major portion of the total requirement. The funding gap has become a chasm.

Under a program of substantially increased levels of state support, the tradition of local contribution and commitment to providing the balance for meeting the need for funds could be preserved by allowing for limited local option taxation of only residential property. The power equalizing mechanism could be utilized to insure that equal funding yields would occur in school districts with unequal residential property wealth per pupil but equal exertion of tax effort as measured by the tax rate voted on residences by the local electorate. Public preferences for improvements in school programs beyond that provided by the state's contribution for fundamental education can be clearly and directly expressed through local elections on "leeway funds." In this instance, the benefit principle of equity in taxation applies in the sense that communities which desire an enriched school program could choose those benefits at their own expense as their preference over other public or private goods and services.

In sum, the combination of state support derived from income tax and other state revenues, a new statewide uniform property tax on all non-residential property and a limited local option tax on residential property with equalized yield for equal effort would seem to be a viable alternative which would satisfy *Serrano*'s requirement that schools be financed by the wealth of the state as a whole and at the same time would preserve an element of local contribution, commitment and control. Professor Benson's ideas support this approach.

The use of locally voted taxes on residential property would seem to serve the cause of household choice without going the full voucher route. The idea of family power equalization is intriguing, but it is an idea whose time has not yet come in Oregon. Large portions of the state are sparsely settled. Direct payments to consumers for purchasing educational services simply is not practical where there are not enough pupils to enable setting up even one fully comprehensive educational program, let alone competing programs.

One variation on the voucher plan which might be worth exploring is the use of direct payments to parents of pre-school youngsters for the purchase of kindergarten instructional services. Public kindergartens are generally non-existent in Oregon. Pre-school educational experiences are mainly provided through private enterprise in the open market to those families that can pay the price. It would seem reasonable to use an income test to determine eligibility for kindergarten vouchers. Although objections could be raised to a welfare approach to early childhood education and also to the hazard of hucksterism by nursery school entrepreneurs, the present arrangement in which kids get kindergarten only if their parents can afford it does not serve equality of opportunity very well.

Professor Benson examines the concept of full state funding in his paper in terms of the basis under which monies might be allocated to school districts. He discusses district wealth and educational needs as two possible criteria of determination. A schoolman, by the very nature of his calling, necessarily must favor the needs basis. The axioms that apply are: school funds should be raised according to the ability to pay school taxes and, school funds should be allocated according to students' need for educational services. Both concepts, ability to pay and educational needs, are heavily loaded with qualitative and subjective judgments. But, just as economists are improving their skills in objectively determining tax paying ability, so also are educators improving their expertise in determining educational needs. Tests and other measures have a long way to go, but they are getting better.

Professor Benson expresses the view that *Serrano* will lead to a dampening in the rate of advance of educational spending. The general public doubtlessly will heave a sigh of relief if this prediction of a final blunting of educators' seemingly insatiable lust for more school money does, in fact, come true. Actually schoolmen will welcome an end to the acceleration of school costs, if *Serrano* also leads to an assurance of funds for basic education without annual multiple referenda on whether to have school or not. With basic funding assured, program priorities can be faced and decided rationally. The hand to mouth, survival pattern could be broken and educators would at last be able to determine with their patrons what is to be done in the schools and then deliver on their promises.

AFTERNOON DISCUSSION PERIOD

Member of the Audience: Within the context of the *Serrano* decision and the solution that is likely to be forthcoming, what do you see in the way of change in the governance of the schools in America?

Professor Benson: Simply because I've seen a full state funding proposal being developed, let me comment and then, of course, anyone else up here is welcome to comment.

There are two proposals for change in school governance under the full state funding proposal, but first allow me to make clear that local school boards would remain in existence. They would still have the power and duties centering on the question of hiring teachers or at least of determining the eligibility of teachers to work in given districts and regulating promotion.

That's just the background. One proposal that the Fleischmann Commission of New York State is making is that the individual school become more of a decision unit in itself. That is, Fleischmann says that when one speaks of local control of schools he interprets that literally and he says what people are interested in really is what happens in the school and not in this collectivity of the district so much. Now How is this to work? Well, frankly this part of the report is still being written. The idea is that there is something called a school family; the problem is defining who is in it. Obviously the teachers are in it, obviously the principals are in it, parents, maybe students, maybe people who live in the neighborhood who have some interest in it, so there is a school family which should have increased powers. If you're in a unionized situation it's hard to say that the school has final authority on all teachers that work in it, teachers move around by seniority. The school can choose between newly hired teachers. The board can say, "Now here's the list of teachers we think are eligible to teach in this district," then they get the schools to try to bid for particular ones of those. They could be a part of the school budget that could be handled in the single school, they would like to think that each teacher had a sum of money to spend in his classroom, this sort of thing. So that's the idea of the local school as the decision unit that's now being built up.

The second proposal is that of the increased role of regional education government and the offering of services to school districts, schools and students individually only as a desired basis. Now the idea is that the regional authorities have certain services mandated, those for the most extremely handicapped, very expensive technical education programs, etc. These programs the schools have to provide to however many want to come. But the idea is the district superintendent has a sort of catalog, like a university catalog, and this is circulated in the schools where students want these specialized courses and if enough students want any of them they offer it. Now if the regional superintendent wants to have a bigger operation then he can get a bigger operation by appealing to his clientele, so in a sense and under some controls, this introduces a bit of competition within the public section. But the question of how much time the regional authority can infringe on the time of the school district, whether all the extra services have to be after school or weekends, that's still being worked on.

Now the only other piece that can sort of tie this whole thing together, between the state and localities and so on, is the idea that there should be a school by school accountability system where periodically one raises questions in the individual schools specifically about, but not limited to, their budgets; questions such as truancy rates, teacher turnover, and simply collecting opinions about what the people involved think about the place. Another question asked by clients may be: what happens to students after they leave the school. If it's an elementary school how do they fare in junior high school and so on.

Senator Boe: Just briefly one of the problems that we face so far as the controls of education are concerned, local controls, state controls, is this: if we go to a system of 100% state financing, there is no way that I can see at this time that we can allow the school boards, the local school boards, to set salaries. In Oregon there is a constitutional prohibition against any kind of deficit spending. For a dollar spent there must be a dollar in the bank. There is no way we can obligate ourselves to pick up the cost of education and then turn it over to 350-360 school districts and say now negotiate your salaries. We must come to the point, I believe, where either a statewide central authority designated by the legislature or the legislature itself has to grab the bull by the horns and look him in the eye and say this is the way we are going to set minimum teacher salaries on a statewide basis.

If you grant that premise, then the next premise comes. You say then the state has to be able to say how many of what different teacher subject areas are going to have, so one school doesn't load up on one group. There are other ramifications. But until or unless we come to a position that we can say that the state is taking 100% of the financing of education, then I think we are going to have to leave the salary a variable with the local school board. If the state assumes 100% of the financing of education some things may well be different.

The legislature for better or for worse is more insulated against the public than are local school board members. There are economic sanctions being taken against board members because they take unpopular positions with regard to teachers. There are sanctions being put on teachers because they get the school boards upset. And we have this situation in Oregon, in every state for that matter, of the rising militancy of teachers for their own economic interests and in a free enterprise economy I can't object to a group lobbying and working for better wages but I do say that if we come to 100% state financing the salary setting function must reside with the legislature or a group designated by the legislature on a statewide basis.

Professor Coons: To leave some responsibility to the consuming unit for payment for the service, for education, may not always be a bad thing; it may be one source of variety that is, in the sense that you require the consuming unit, the school or the district, to provide a substantial part of the revenue – you put a natural brake on its otherwise gluttonous appetite for spending. And it's the same if you go through a voucher system for families and give them a choice as to how much is going to be spent, a choice about the size of the voucher. It's only by requiring them to make a substantial sacrifice and having it fairly graded, and sensibly graded, that you put a restraint on their appetite at some level for spending.

Now with respect to the governance issue, one might add that you can imagine a system that we haven't talked about in which the state would shorten the normal or average school experience in public financed education, homogenize it around the state, make it a three hours a day, morning experience, something like that, with the essentials provided by the state utterly uniform at a reasonably high level and then give the poorer children, or by some definition the educationally disadvantaged school, stamps with which to purchase a wide range of approved educational experiences or goods and let the rich, as they would and as they do, add to the publicly provided experience with the kind of piano lessons that you provide for your children and as I would. Let the poor now share in that form of governance, that is, that variety of experience that they don't have access to.

Professor Frohnmayer: I should be out there because I have a question for the panel too; that is, the question of constitutional standard of fiscal neutrality. If that is a constitutional standard, can you think of tests by which it is measured? Putting aside all of my remarks from this morning, assuming *Serrano* was the law, how does one tell, if he is a state legislator, whether or not the scheme which he has adopted is constitutional? If fiscal neutrality is the test, what are the indices of fiscal neutrality? Is this a problem to worry about or am I holding up a straw man? I don't really know.

Professor Coons: Well, the nice thing about the existing system is that it is obviously in violation of that standard. That is to say, one knows that whatever the future might produce in the way of sophistication we do not have to face that issue immediately. I would think that insofar as the state responded to a *Serrano* kind of decree with a reshuffling of the property tax base, or to put it another way, insofar as one is dealing with an arithmetical equation provided by the system itself, there is no great difficulty in determining whether or not the standard is met. It is easy to do so now because the very statutory structure of education decrees that spending shall be a function of wealth. It is structural, it is a discrimination machine on the face of it.

Now, let me give you an example from a somewhat different world. If you looked at the University of California you might say that the University of California violates the *Serrano* norm because it has a large number of middle class and upper middle class children, children of wealthy families who come there and there is a *de facto* discrimination by wealth. You ask, now why are they there, why aren't the poor kids there, what kind of complaint do they have? It's a very subtle kind of complaint, if any. It may be that higher education, such as the University of California, may in many subtle ways violate the norm. But there is nothing in *Serrano* which requires the court to dive into that maelstrom of problems, so long as the state is not on the face of the system engaged in that kind of discrimination.

Somewhere between the present system and the total *de facto*, if you will, kind of discrimination in the University of California, lies the community college: there is no compulsion to attend school, and there is perhaps a larger measure of non-property tax input, but there is still a geographical base and property tax attached to it. I think that probably the community college, so funded, violates the norm because I don't think that the norm depends upon compulsory attendance. But again it is easy to see that there is wealth discrimination, it's a matter of arithmetic and so long as the state depends upon a system in which the discrimination is structural the court has a very clear standard.

Now whether the state wants to go beyond that I have no idea. I would not strongly urge it to go beyond that and I don't think there's any necessity. The important effect of *Serrano* is to get the legislature to give the bedrock re-examination and that's all the further you have to go to get them to tear up the old system and begin with something new.

Professor Benson: I am complimented to think that I can comment on the constitutional question. The New York rule is this: you have more education financed by statewide tax system and money is distributed on the principle of equal dollars per student except where a departure can be justified for some educational reason. Now I like to think that the educational reason can be defined; more money for the handicapped, that sort of thing. I think in higher education there could be a problem. It's plain that public expenditure, not private, but public expenditure is strongly a function of the grades a student gets in high school and the range runs from something like $5000 on the average for A students down to something like $800 for C students. And I think one needs to approach this without violating notions of equality in the educational institution. It's a quality of demand selectivity. If I think we really wanted to go far on a more ideal income distribution system one might arrange it so the C students gained some compensation for the fact that in a way they are being discriminated against in higher education expenditures.

Professor Frohnmayer: Let me follow that up with a point which Professor Coons may wish to address. Assume that two school districts are each given $1000 under the McCall plan. It is obvious that the special costs peculiar to a given district may vary enormously so that the net amount of dollar expenditure allocable to per pupil classroom hours will be far from uniform, even with an identical gross per pupil state subsidy. The question is whether it matters that part or all of the state subsidy goes for capital costs or busing expense or higher than average debt service for a newly constructed high school? Obviously a number of factors affect costs; I named five this morning, and Senator Boe articulated ten variables suggested by the Lawyer's Committee for Civil Rights. My question then is whether the particular objects of expenditure in a district are **relevant** constitutionally, and whether all of them are **permissible** constitutionally? Is the constitutional standard required to take into account those kinds of things which depend on these difference variables? Otherwise, measured by classroom hour input (or other index of educational "quality") the blanket state financial allocation still results in substantial variations among districts in the amount of money which actually serves to benefit the individual pupil in the classroom. What is the constitutional response to that?

Professor Benson: I would like to say one more thing first. In practice the notion is that the, say $300, would be treated as a categorical item. What he's doing is trying to assure equal dollars in the instructional budget, meaning teachers essentially. And then having this other added on. Now possibly if you feel it's an educational reason, one could put in money for disadvantaged students.

Now one thing that hasn't been discussed. Even if that $1000 is just for the instructional budget and there are none of the abstractions you've just described, it's possible that the prices of educational services will vary geographically and frankly there is no measure of that; just as there is no measure of how much money is required to produce a certain amount of change in learning in child X.

Professor Frohnmayer: The problem which still concerns me is the judicial standards by which all of these complex matters of expenditure variation are to be evaluated. Are we still in the "super-rationality" test, or need the state only show some legitimate state interest in the expenditure variations under the old equal protection test?

Professor Coons: Well, first of all *Serrano* doesn't make the world perfect. One might hypothesize a state in which one might like to educate only the gifted. And what would you say about that? Is education then a function of wealth? The state says we're going to take the smartest kids, the best looking, or the most intelligent looking children and educate them because we don't have enough to go around and what we really need is an elite which will provide the brains to run our technological system and the rest we can feed and keep warm and happy and the smart kids will take care of them. Well that doesn't violate *Serrano*. It may violate a lot of other things, however, that you may feel strongly about. But what *Serrano* says, and simply, is whatever you do, don't do it according to wealth. So then it matters how you define wealth. Now it may be that the cost of transportation to a sparsely populated school district is something which in realistic terms we could speak of as the difference in wealth. That is, that for children living in such a district to get to whatever educational experience they're going to have is a charge upon somebody. You can't get to that education and enjoy its quality unless you have removed the burden of the physical distance. And so it is realistic in economic terms to speak of that as wealth. But then the question becomes, is it sufficiently clear; and Professor Frohnmayer's problem about the clarity of the standard becomes very important. You say, well can a court fool around with that kind of economic difference? Sure it's a wealth difference, any economist will say it's a wealth difference, but can you show it to the satisfaction of the court, can it enforce it clearly? The answer is, I think, yes in the case of transportation costs. There you can tell what it costs. You've got contracts, you've got distance, you've got gas and so on and that's fairly easy. But the hard questions such as municipal overburden, how do you measure what the wealth difference is for Portland as opposed to Eugene? I don't know and nobody knows and that's why the court won't get into it. I think they'll simply say: sorry that is judicially unmanageable; we've done the best we could with the obvious kinds of differences in wealth that the state itself has created in this kind of discrimination machine that it has defined and that's where we stop; we can't do everything and we've done that.

Member of the Audience: I'd like to direct a question that I think is relevant to Mr. Boe's statement. It seems very relevant to ask what will happen when someone decides to test whether the *Serrano* case will not hold good under county and city financing. If you have to change the tax base in order to raise the money for schools I'm sure you'll have to change the methods we use to raise money for the counties and cities.

Senator Boe: I would disagree with your premise first of all. I don't think the case said that you can't use property taxes for anything that you want to use them for and that the legislature decrees. It only says that wealth cannot be a factor.

When I first heard about *Serrano*, the obvious question came to my mind: will *Serrano* be applied then to city governments or county governments? My city only spends $30 per person per year for city services and Eugene spends $47. Is that not also economic discrimination as defined by *Serrano*? I suggested, and I think Professor Coons said also, that it does not involve that. To me there is a relationship between city services and county services and what my property has a just reason to bear, because the services improve and protect the property. In my opinion, educational services are not related to property, or not as closely related to property.

Member of the Audience: If the standard of the court in *Serrano* was that quality education is not based on wealth then how could the court allow any kind of local financing over and above the amount of state financing? There would be a clear correlation between the amount of assessed value in a district and ability for and willingness of the taxpayers in that district to exceed the state allotment and therefore we're back in the same position where the quality of the education is based upon the wealth of the district.

Professor Benson: If I could rephrase that just a little bit, the district power equalizing scheme carries the idea that any two school districts that have the same level of tax rate spend the same number of dollars per student. As I understand your comment, take two districts one with rich households and one with poor households: now even though two districts have had their local tax bases equalized made equal in a fiscal capacity, you're saying that the district with rich households would be more willing to exceed itself because they're more interested in education than the rest of us. I'll also put it this way: once one changes the game the richer households will resume leadership in education spending. That's the way I see it. Jack Coons sees it differently. As I understand his argument, because it's been the poor districts in the past that have been willing to tax themselves at higher rates, they've gotten accustomed to that and are going to seize this opportunity they have to move themselves ahead. If my point of view on this is correct then I think it is difficult to satisfy *Serrano* except under full state funding. Professor Coons what do you say?

Professor Coons: I don't know how people will behave if you equalize their tax capacities by districts but do not take into account their personal incomes which we don't really know. There certainly is some difference in economic theory. One would think that there would be a difference which would be income specific with respect to voting behavior. On the other hand, the social information that we have about the attitudes of the poor may suggest something else, if it suggests anything, we really don't know.

People like Allen Wilson, Coleman and others who have studied the attitudes of the poor toward education report that it is higher in their scale of values than that of the rich. They report that the poor see education in fact in an unrealistically promising way. They seem to be likely to make almost too much sacrifice for education, that they will overvalue it. Well, I'm exaggerating a little because there isn't an awful lot of evidence. We don't know because they've never had a chance to tell us. They now go to their neighborhood school and they are assigned there and haven't much to say about it so they don't get very vocal about this particular problem. But it would be very interesting to me to see how districts which had large low income populations would in fact behave if they were given the opportunity to respond to a power equalizing system.

Now remember this morning when I gave my example I used the property tax but I didn't say that I thought the property tax was the best way to run the system. I said that I thought a local income tax would be best, and precisely for that reason, because it is a properly progressive tax and it would put the rich and poor families into a truly equalized situation where voters would all stand roughly in the same position with the same stakes. And so the price of education would be the same for everybody in a more realistic way. And so I think power equalizing based on a local income tax, a surtax locally chosen, might take care of the problems described by Professor Benson.

Professor Benson: I would think you could go a long way with the problems that I have with it. We must be talking about a piggyback tax. I mean you can't administer an income tax in the size that local governments and school districts are. Now you can piggyback either on the state or federal returns if you've got official cooperation. But to me a piggyback tax is not often one you have room to maneuver and reach. Not as much as property tax. So I say, establish a tax where you can have some local variations. To me an income tax is just another route back to full state funding.

Member of the Audience: Are you basing this tax on a district basis or family basis?

Professor Coons: I prefer family, but district will do it. Suppose we get real equality of capacity. Suppose that we hypothesize a system in which districts are really equal in a sense that economists would all agree on. Then you say you really get down to the crunch because you say there's something wrong about a system which permits voters in one district to treat their children differently from voters in another district. That's what you're saying, right, that's what you're asking?

Member of the Audience: The court didn't use the word quantity, it used the word quality.

Professor Coons: Right. Okay now the response of the *Serrano* style enthusiast is that you have a dilemma. On the one hand, you say that it's bad for the children in District A that the voters voted against a kindergarten. But then you've got to be willing to accept the vote of the entire state against kindergartens in your system. You've got to be willing to say that if the legislature says no kindergartens here you're not going to let District B make an additional sacrifice and have a kindergarten. You can't have it both ways; are you going to depend upon the local political entity to make a variety of decisions some of which you will disapprove, or are you going to go to the state level to have decisions made on a mass, homogeneous basis? In that case you run the same risks of disapproval, but you have only one political option, that's to go to the center and if you haven't got the power to move the center then you don't move at all anywhere.

Member of the Audience: What I'm in effect asking is: is that not what we're left with if you truly follow the dictates that the quality education is not going to be dependent on wealth? If you want the district to have options, the propensity to spend in behalf of these additional programs will be greater among those districts with larger incomes than in those districts that have lower incomes.

Professor Coons: How do you know? It may be that rich Hungarians do not like education as much as lower class Jews. Let's consider the Amish for example, the people who may have cultural differences which relate to schools, their feeling toward education. You can't say we won't let you feel that way, you've got to value education the way the state legislature values it and so we're going to say you've got to spend $1500 no more, no less; you can't have a kindergarten even though you're willing to work for it at the same level as everybody else. Okay, I respect that judgment, it's a judgment that may in the end prove to be advantageous for a lot of reasons. It's just not my judgment. I like to see people have an opportunity to be different.

Professor Benson: I have just one more point I would like to make.

If you have full state funding what you are doing may be satisfying in your strict determination but you by no means are getting equal education because what the rich families will do is simply supplement in private sectors, provide more tutoring for example, and instead of the rich family buying music and ballet and so on, on the side they'll begin to buy mathematics, English, etc. Now that is a kind of loophole of full state funding. And I think we have to have loopholes so we won't kill each other. But the argument between Professor Coons and me is whether you want your inequities within the public sector or outside, and if I had to say one or the other I would say on the outside.

Member of the Audience: Is there any evidence that *Serrano* decisions are stimulating any real look at the assumptions of what constitutes equality education?

Professor Benson: There's a body called the National Institute of Education, which the President proposed be established and because of his concern that we had to know the information about how much money it took to do what in education. Now in the meantime the President has decided that spending $300 for a minority student does the job so we don't have to worry about busing anymore. Somehow he found out this information before the National Institute of Education even got its money! But seriously, education research is not in good state, but it's not quite dead either.

Member of the Audience: What about the variability of expenditure within the schools?

Professor Benson: The recommendations of the New York Commission do propose that the extra funds for educationally disadvantaged get to the schoolhouse. Now except for this school accountability idea which I mentioned earlier it is not proposed that within the schoolhouse one try to regulate that money is spent only on the three-quarters of the students who are disadvantaged and none at all on the quarter who are not disadvantaged. The school becomes the accounting unit and intra-district expenditure differentials ought to be controlled. Now this is not inconsistent with the idea that once the money gets to the school the school itself has something to say about how it's being spent. So as to the final question, what is the intra-school distribution of expenditure from student to student, the Fleischmann Commission would say that is substantially a school judgment.

Mr. Munn: Let me just respond about the Governor's program. The only statement in the Governor's speech was a statement on a flat grant for grammar school and one figure for the grammar school and one figure for high school students. The Governor has since announced three committees that he's appointing; one would deal with the distribution problem and I suspect that the committee and the legislature will greatly change this simple flat grant program to possibly deal with the type of question you've raised but there's no assurance of it now.

Member of the Audience: Here's a problem we have. We found that in School District One, which is a school district in Portland, as one moves down the socio-economic ladder you find that the achievement levels of children in various schools in District One lower. I'd like to know if there is a process to explain why this is so.

Senator Boe: The problem of the various levels of achievement which are important in School District One are also existent, to perhaps a lesser degree I would imagine, in almost every school district in Oregon. We have achievers and we have non-achievers and we have ethnic differences and all the rest of differences. The Governor's proposal of course does not cover this consideration, the problems that you're referring to. Obviously, in this case that you're referring to, money probably is the key factor in the thing. I don't accept the premise that there is a one to one correlation between money and a good education. Again, if you will recall the statistics, your school district has a much lower operating cost per pupil than a small school district and yet you have much more variety in your district than any of the small school districts in Oregon. I think here it's a matter of money, and where you get it and how you get it is something that the legislature and the federal government are going to have to take responsibility for.

Mr. Kirkpatrick: Both this question and the comments just made are pertinent to a more general evaluation of the relationship between money and educational quality. Some people have suggested, and I think the Coleman report made some suggestions along this line, that the cultural background, the intellectual level of fellow students is really maybe the most fundamental factor as far as educational quality goes. We have observed in Legal Aid the situation in the type schools that the poor go to. It makes our attorneys realize that children of welfare mothers tend to go to school with children of other welfare mothers, educationally disadvantaged tend to go to school with the educationally disadvantaged, culturally deprived tend to go to school with the other children who are culturally deprived, whereas out in the suburbs the children of professional people and the intellectual tend to go to school with children of other professionals. This problem may be even more controversial than shifting taxes. When you start shifting the neighborhood residential patterns and busing to distribute the educationally disadvantaged to other parts of the system to keep them from being concentrated in one school, this may be even more controversial than school financing. Yet that type of shifting, getting people who are culturally and educationally disadvantaged in some way exposed more to people who aren't and have a higher level of family background, this may be a more important factor to providing true equality of educational opportunity to a disadvantaged student than having him get $900 a year instead of $800, or $1000 a year instead of $800.

Member of the Audience: This word "wealth" ...what is wealth? How can you define wealth? If I may give this illustration: instead of taxing my income producing property, why don't you tax the income I receive from that property? If it doesn't produce income, then don't tax it, and whenever I do receive income, tax it then.

Mr. Edmundson: I think that it has been mentioned by Professor Coons that a better base of determining taxable wealth is income. The reason we talk about property as much as we do is that that is a large part of the present system, and that being the case we have to work with it and try to improve it. A greater improvement is to consider taxable wealth to be basically income wealth, so again, in a word, yes. If you can go out and get the majority of Oregon voters to raise the $36 million they need for education by increasing the income tax rates from 4 to 14 percent to 10 to 20 percent then the answer is yes. Politically, that's impossible. I just don't think you can get the average Oregonian to agree on that kind of shift.

Mr. Munn: Let me give you one illustration of how the Governor's program would work in its simplest application. Let's take your $100,000 piece of property here. Now the Governor's program calls for income producing properties to pay $10.25 per $1000 true cash value for purposes of education. Let's say that your property is in a 3% tax district: presently your property taxes are 3% of the true cash value, or $3000. Under the Governor's program just for education this piece of property then will be assessed $1,025 for the purposes of school. Now if we assume that in your school district all the rest of the local government services are 25%; 25% of your present property tax is $750; so for local government services you would add $750 to the property tax and you would come out with a total here of $1775 in property taxes as against your present $3000. Now, if you have a payroll tax then your 1% payroll tax would be on top of that. But in this case, where your payroll is probably limited or very seasonal, you could stand to gain almost the difference between $1775 and $3000.

Member of the Audience: I'd like to know whatever happened to Johnny Serrano.

Professor Coons: His father actually moved to a rich school district! It's very strange, it's too good to be true really, but it's true. Johnny Serrano turns out to be a very smart kid and his school principal took the father aside and said you really ought to get this kid out of here. We've got such lousy schools in wherever it was he was at, I think it was Whittier ...no, that's the President's old home ...but anyway, well maybe that's where he moved to, I don't know. But he's well and prospering.

Professor Benson: The moral is take advantage of the inequality while we've still got it!

Appendix A

A First Appraisal of Serrano*

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A host of legal and related issues have been posed by the recent decision in *Serrano* v. *Priest*;[1] a selective scanning of these issues, in an attempt to ascertain their importance and likely impact, is now necessary. In *Serrano* the Supreme Court of California held that to the extent existing differences in spending among school districts are caused by differences in wealth,[2] the present scheme for financing public schools in California violates federal and state equal protection guarantees. The court further held that although school finance mechanisms may differ along many dimensions, they must respect one proscription: the quality of public education, at least as measured by spending per pupil, may not be a function of wealth other than the wealth of the state as a whole.[3]

Redundancy may be helpful here. One restatement of the court's holding is that *Serrano* requires of the state a *fiscal neutrality* among those agencies it creates and empowers to make different choices regarding educational spending. Another paraphrase would be that, to the extent the state allows quantities of public education to be bought by local units (whether counties, school districts, schools, or families), unit wealth must not be allowed to affect the quantity purchased. Since, as things stand, local taxable wealth per pupil is a major determinant of public school spending in almost all states, *Serrano* is significant; insofar as fiscal neutrality is not an elementary or unambiguous concept, the meaning of *Serrano* remain obscure. Speculation about its career is worthwhile if risky.

There are already signs of the decision's legal vitality in addition to the untutored (and undeserved) hosannas of property tax vigilantes and political opportunists. The holding has been approved and applied to the Minnesota financing system in a declaratory judgment by the Federal District Court in *Van Dusartz* v. *Hatfield*,[4] and to the Texas financing system in *Rodriguez* v. *San Antonio Independent School District*.[5] Many similar suits are progressing toward judgment in other states brought by lawyers acting in apparent accord on the fundamental question. Anticipatory responses are stirring in other branches of government at all levels. Given the present quantum of activity one might conclude that a series of major decision-points may be at hand regarding the forty-five billion dollars collected and disbursed for elementary and secondary education in the United States.

Radiations of *Serrano* are likely to touch increasingly wider rings of power and interest, each likely to be affected and to respond particularistically. Three of these rings will be briefly considered here. The narrowest focus is the judicial arena: what will happen to *Serrano* and similar cases (e.g., will they be reversed?) and what is their significance to the body of Constitutional law? Next, *Serrano* holdings imply fairly prompt legislative action; how will state legislatures and the federal government respond (e.g., by a centralized or decentralized system)? Finally, there is the longer-run impact upon and reaction of the political community as a whole: what major changes are predictable over time given this major thrust toward redistribution of public resources?

The First Ring:
Serrano, The Courts, and Constitutional Law

The Posture of the Present Litigation

A variety of procedural and jurisdictional questions leave the eventual fate of the *Serrano* case itself *in nubibus* and will affect the rate of its progress through the system. It seems likely that the case which first

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reaches the United States Supreme Court will arise in another state and through the federal courts.

There are two federal doctrines which are relevant here. The first is the "final judgment" rule which probably insulates *Serrano* itself from immediate review by the federal high court.[6] That is, *certiorari* should properly be denied since the case arose and was decided on the pleadings and presumably will go to trial at an early date. The California Supreme Court itself has declared the decision not to be a "final judgment."[7] Only when the trial and the available state appeals have been completed will the case be ripe for review on *certiorari*. Of course, review could occur at the present stage if for example, the United States Supreme Court concludes that the trial is but a formality.[8] The *Serrano* opinion may be read to foreclose every factual issue except the allegations concerning tax rates, spending, and district taxable wealth which are matters of public record and apparently undisputed.[9] So viewed the factual result is foregone. Nevertheless, the state proceeding will involve the substantial and delicate question of the appropriate order; thusfar no one has been ordered to act or refrain from acting in any way. It is unlikely at this stage that the U. S. Supreme Court would reach for the case.

The longer range question is whether *Serrano* is vulnerable at all in view of the possible presence of an "adequate and independent state ground."[10] The opinion cites the state constitutional counterparts to equal protection as supporting the result and then adds artfully that the California law is "substantially the equivalent" of federal equal protection.[11] This represents another step in a continuing *pas de deux* between the California and United States Supreme Court.[12] The California court could have either insulated the decision from review by stressing the independence of state law[13] or harmonized its judgment with an emergent federal rule by striking "substantially."[14] What it has done instead is to leave the federal courts free to move to the merits on the federal question while leaving itself free to preserve the result in California even if a *Serrano*-type case goes down to defeat by the Burger court.

In all probability *Serrano* itself will never be decided on the merits by the U. S. Supreme Court. Some of the cases now in process in federal courts may face their own problems of delay and restraint under the abstention doctrine,[15] but it is most likely that one or more of them will reach the high court in the next eighteen months, well ahead of the probable *Serrano* timetable.[16]

It is also possible that the *Serrano* rule could be seriously affected or even subsumed by the decision of a case or cases which barely resemble the school finance litigation. One candidate is *Johnson v. New York State Education Department*,[17] decided by the United States Court of Appeals for the Second Circuit. The complaint asserts that fees for textbooks are unconstitutional, because education is a fundamental interest and fees are an invidious discrimination on the basis of personal wealth. The court split 2–1, holding against plaintiff children. Should the Supreme Court review the substantive issue and decide it against plaintiffs, it may be hard sledding for *Serrano*-type actions, although there is an important distinction available in the purely *de facto* character of the wealth classification in *Johnson*.[18] Contrariwise a substantive victory in *Johnson* would be most helpful.[19]

The Holding and its Rationale

Whatever the procedural odysseys of the current litigation, in the long run the substance of the problem and its solutions will determine the final outcome. *Serrano* begins with a complaint about the manner in which public schools are financed in California.[20] This financing system, shared in its essence by almost all other states, relies upon three sources of money: local school district taxes (on property), state aid, and miscellaneous revenues from the federal government. Federal aid tends to be directed toward specific educational purposes (e.g., disadvantaged children, school lunches) and constitutes only a small fraction of total spending for public schools. State aid is distributed in two principal ways: first, under the "Foundation Plan" the state sets some level of educational spending (say $500 per pupil) which the state will support on a fully equalized basis. "Fully equalized" means that any incapacity of a district to raise that amount of money is compensated for by the state. For every district there is calculated the amount of money that would be raised by a levy on its property of some *rate* (e.g., 1%); to the extent that the amount raised from this 1% would fall short of the foundation level, state aid makes up the difference. Thus, the poorer the district, the more the state supplies in foundation aid. Second, the state dispenses "flat" grants; this is a uniform amount—$125 per pupil in California—which is guaranteed to all districts if they do not receive this much in foundation aid; in short, it is money for the relatively rich districts.[21] Overall, however, these state and federal subventions somewhat prefer the poorer districts.

Finally, there is the local tax levy. This last category of public school revenues, because it is so sensitive to the wealth of local districts, is the real source of the *Serrano* complaint. In 1968–69, the foundation plan in California equalized districts up to $355 and $488 spending per pupil respectively for elementary and high schools; yet the average respective spending per pupil in the state during 1968–69 was $611 and $836. This substantial difference between equalized support and actual spending is supplied mainly by local revenues, and each dollar of local revenue per child comes at a different tax price for every district in relation to the wealth of that district. Because for the poor district each dollar above the foundation represents a much greater tax sacrifice (rate) than for the richer one, spending per pupil is highly correlated with, and obviously influenced by, local resources. If every district sacrificed equally for education, levying the same educational rate on its assessed valuation, Beverly Hills, at $87,000 assessed valuation per elementary pupil, would raise over *ten times* as much local revenue as West Covina, at less than $8,000. While Beverly Hills is too wealthy even to be able to spend all it would raise at a tax rate equal to the statewide average rate for schools, West Covina is too poor to run a school at that same rate. In 1968–69, with all aid included, Beverly Hills spent $1,232 per pupil at a local tax rate of about 22 mills; West Covina, at a rate of over 44 mills, was able to spend only $621 per pupil—half the spending for twice the tax rate. The example is not an extreme case. Analysis of the entire distribution of districts reveals a consistent pattern.[22]

This nexus of wealth and spending is the target of the *Serrano* and *Van Dusartz* holdings. The rationale adopted by the two courts to void that nexus invokes the converging persuasions of the "fundamental interest" and "suspect classification" test—classification by wealth of school districts is constitutionally suspect when it affects the enjoyment of a fundamental interest, which the court in each case held education to be. To justify its injury to plaintiff pupils caused by a wealth discrimination structure, the state must show a compelling interest the advancement of which requires such a system. It showed none in either of the cases.

A few words about these tools of equal protection analysis developed by the Warren court[23] are necessary but risky. The fundamental interest label obviously confers a special constitutional status. However, in itself it suggests no specific prohibitions or prescriptions of state action. For example, to declare an interest fundamental is not necessarily to prescribe an equality of its dispensation. The right to travel may be fundamental without its forbidding cheaper bus tokens for persons over 65. The presence of fundamentality by itself decides no cases. It merely triggers an expansion of the court's ordinary view of what is relevant and of its ordinary standard for determining the validity of state action.

The Court's standard, in most equal protection cases, is mere legislative rationality; in fundamental interest cases it is no stretch to define the standard as super-rationality—the state action must appear to the Court not merely as sane but as plausible policy. In the voting cases, for example, the United States Supreme Court has spoken of "the exacting standard of precision we require" of the state in its selection of persons appropriate to exercise the franchise.[24] Thus, the fixing of a very limited cadre of privileged interests permits the Court to employ a more exacting rationality standard without eroding the more tolerant standard for the general run of cases.

The notion of the "suspect classification" is no less difficult to summarize. On its face it would seem to be a counsel of neutrality which threatens any employment of a particular category. However, if wealth is universally suspect as a classification, what are we to make of the horde of enactments specifically benefitting the poor? Is the idea of the "suspect classification" test not neutrality at all but rather its opposite—partiality to the poor? Perhaps, but if so, why does *Serrano* specifically declare personal poverty to be unnecessary to the outcome, relying instead on collective (school district) wealth alone? Is it, perhaps, because the real principle is, indeed, a super-rationality or "good sense" test and that the use of rich and poor districts to carry out a uniform educational responsibility is simply stupid policy? The *Serrano* opinion invites this analysis with its observation that:

> . . . discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.[25]

In any case this conjunction of "fundamental interest" and "suspect classification" shifts the burden to the state, requiring it to demonstrate a state interest which is both compelling and which cannot be served by a system of finance less onerous to the plaintiffs. If, for example, the state had manifested a compelling interest in having local control over school spending, it would have been necessary to determine under what alternative structures, if any, such local control could be effective. Unfortunately for the state, the court found no such interest in local control manifested by a system which dispenses local privilege and burden so erratically that "fiscal freewill is a cruel illusion for the poor school districts."[26] Thus, it was unnecessary for the plaintiff-children to go further and demonstrate that local control and fiscal-neutrality are in fact compatible.

The premises the court declares in *Serrano* (special interest, suspect classification, absence of advantage to state policy) do not imply or demand the court's conclusion (the rule of fiscal neutrality in education). However, they come as close to this as we are accustomed to expect in the law. In fact, if there is deductive error, some would assign it not to the court's boldness but to its failure to mandate statewide uniformity.[27] In that respect, however, the court deserves high marks precisely because it acted with restraint. If the offending classification in *Serrano* is wealth, the court's decision is properly tailored to eliminate that influence. That the principle enunciated be limited to attacking the particular evil it sets out to abolish is a sound canon of logical as well as judicial parsimony.

Four Interesting Problems for Serranoptimists

Serrano and *Van Dusartz* have a strong appeal because of their factual soundness and moderate constitutional stance. If reversal ensues, the basic reason is likely to be a general condition of stasis in the Supreme Court; the novelty of these cases and their very importance are their primary strategic weaknesses. If the Court is intimidated by the high stakes involved, it may easily wash its hands in the warm waters of the rationality test. However, there are also a number of truly interesting sub-elements in the case that may be thought relevant and be given serious attention by judges and critics. Of these, four are relatively important and will be briefly considered here. They are:
(1) the cost-quality relation; (2) the peculiar relation of fiscal-neutrality to the injury of the individual child; (3) the rationale for treating education as a fundamental interest and its relevance to the status of other governmental services; (4) the conundrums of aggregate v. individual wealth.

First, as to cost/quality, the plaintiff-children's injury because of discrimination in the system of school finance is presumably significant, but the fact is that no one can say how significant. Social science has much to say about the cost/quality problem, but the net effect is agnosticism.[28] The California court comes close to saying that it will assume the presence of a positive relation of money to quality in education in the absence of proof to the contrary.[29] The *Van Dusartz* court says it plainly:

> . . . [T]he Legislature would seem to have foreclosed this issue to the State by establishing a system encouraging variation in spending, it would be high irony for the State to argue that large portions of the educational budget authorized by law in effect are thrown away. . . .[30]

Whether the respective defendants nonetheless will try to put the matter in issue at the trial is anyone's guess. Presumably it is a factual question on which expert testimony will be significant.

The *second* problem is the relation of the *Serrano* rule to the injury. We have said that the rule is neatly limited to the wrong, which is the use of wealth criteria for spending. This is so, but this niceness of the *Serrano* rule produces a remedy much less egalitarian than at first appears. Since local option for spending can remain the key determinant of the absolute number of dollars per child spent on education under a *Serrano*-type rationale, in theory the plaintiff-child could wind up worse off than he started. This could happen in a fiscally-neutral but de-centralized system in which his district (or family or metro-unit) *chose* to spend little on education.[31] It thus is plain that *Serrano* is not concerned with level of spending for education as such. Rather it announces a limited right that, if governmental entities are empowered to decide about and administer children's education, they must be provided an equality of economic capacity to carry out that function. In the strictest sense we are dealing not with a right to education but with a *political* right *about* education. The child is assured only that those agencies which do decide about educational spending shall be created equal by the state. Whether this result is ultimately disappointing to the plaintiffs, however, depends in large measure upon the outcome of the large-scale legislative readjustment which is required by *Serrano* and which may be the single most important effect of the decision.

Third, it is useful to ask: why education and, conversely, why not other governmental services?[32] The issue of why and whether education should be treated as fundamental is rendered acute by the recent decisions in *Dandridge* v. *Williams*[33] and *James* v. *Valtierra*,[34] which seem to reject the fundamentality of the welfare and housing interests for purposes of equal protection. While the California court suggests several relevant qualities of education which support its fundamentality and which are not shared by welfare and housing,[35] the matter is not simple. The deciding factor, clearly, is not the sheer importance of the interest; it seems as important to be alive (health services, welfare) as to be educated. The salient difference lies in education's relation to other constitutional values—especially political and intellectual values.

We must be satisfied here with a mere reference to this tangled question. Presumably counsel in the school finance cases will perceive and argue the right of the child to education both in terms of its crucial relation to the viability of our political system and its inseparability from the values of liberty of thought and speech. At its core *Serarno* represents both a political and intellectual right. It is these qualities which secure its fundamentality and which simultaneously distinguish it from the creature comforts—or even necessities—represented in welfare and housing.

Fourth, the distinction between collective and individual wealth is worth considering. *Serrano* forbids discrimination in education upon either basis,[36] but it is likely that the proof required at trial will be confined to the wealth of school districts. At present it is very difficult to specify the degree to which personal and school district wealth coincide.[37] The economists seem confident that the relation is positive, but the anomalies are frequent and sometimes embarrassing. Not only do poor people inhabit rich industrial enclaves with low populations, but they also are found in large numbers in certain large cities, a few of which, for school purposes, are relatively well off (e.g., New York and San Francisco—a primary cause is significant private school enrollment). Equally troublesome, perhaps, the rich sometimes live in tax-poor areas. *Serrano*, thus, is not a one-edged blade for the war on poverty. However, this relative neutrality among economic classes may provide unexpected political support from the nonpoor who live or own property in poor districts. It also reinforces the view that the decision has as much to do with rationality in government as with poverty.

Economic neutrality may or may not impair the analogizing of *Serrano* to the earlier wealth-discrimination cases. These decisions all dealt only with personal wealth, not with the wealth of governmental units. This distinction is not necessarily harmful to *Serrano*. What the case lacks in terms of the highly visible personal impact of discrimination upon a plaintiff-child, it retrieves in terms of the mass effect of these absurd education financing systems upon the injured class of plaintiffs[38] as a whole and thus upon society. Further, as the California and federal court both emphasize, the fact that the districts are creatures of the state eliminates the *de facto* debility from which all the previous decisions suffered:

> . . . we find the case unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. . . . [citations] Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. . . . [citations] Compared with *Griffin* and *Douglas*, for example, official activity has played a significant role in establishing the economic classifications challenged in this action.[39]

Finally, even if discrimination based upon personal poverty were taken as a necessary criterion of judicial intervention, it is present in the facts of the school finance cases in two respects. First, the present system bears hardest upon those inhabitants of poor school districts who are themselves poor and thereby precluded from exercising their right of exit to the private school. Further, it seems appropriate for the court to view the class "children" as simply a sub-group of the class "poor". Realistically all children are poor.[40] Statistically most are protected from their poverty by the private activity of their parents, but this should not insulate the state from responsibility for their education in the public sector. The problem here is similar to that recently scrutinized by the federal court in *Chandler v. South Bend Community School Corp.* [41] There public schools took punitive measures against children whose parents failed either to pay school fees or sign an "inability to pay" form:

> The school fee collection procedure as applied to these minor-Plaintiffs, conditions *their personal* right to an education upon the vagaries of their parents' conduct, an intolerable practice . . .[42] (ital. in original).

Such separation of the interest of child and parent could be enormously significant in future encounters among pupils, parents, and the state on issues ranging from compulsory education to school finance.

The Second Ring: Likely and Acceptable Legislative Remedies

The *Serrano* and *Van Dusartz* holdings allow for much legislative discretion as to the kind of system the state can constitutionally propose as a remedy in the litigation. Differences in spending per child are permitted, whether based on educational policy decisions by the state government (aid for the disadvantaged, gifted, handicapped) or by local governments.[43] Complete spending uniformity, or uniformity plus the categorical add-ons just mentioned, is also permissible. All that is forbidden is employment of units with similar tasks but differing *capacity* to spend.[44]

Educational spending uniformity supported and supervised by the state government is not difficult to understand as a legislative remedy. Categorical aid (i.e., policy or "needs" aid) is similarly clear. The only elusive and somewhat controversial remedy is the one which allows spending levels for education to be fixed by the local political process. How can local spending options (unsupervised by the state as to motive and purpose) be retained under *Serrano?* The practical responses lie essentially in larger equalizing aid to districts and/or smaller differences in their taxable wealth per pupil. Under present systems, meager doses of such equalizing state aid are used to implement an implicit legislative policy that spending may not be *entirely* a function of wealth. Aid for education is dispensed inversely to wealth and (occasionally) positively to tax effort. Under *Serrano* these subventions to the poor districts could be increased to the point at which each district is in effect equally wealthy for purposes of public education; or the district tax bases could be altered to that same end;[45] or both.

Such systems are called "power equalized."[46] At present they are hypothetical. Their effect on spending is simple. Among districts with similar educational tasks spending above some legislated minimum (plus categorical aids) would depend solely upon the locally chosen education tax rate on real property (or on other local sources). To be number one in spending a district now would have to try the hardest instead of be the richest. Listening intently, one detects in power equalizing a medley of the WASP ethic and the *Marseillaise*.

Valid State Systems Exemplified

At this point illustrations of a few state systems compatible with *Serrano* may be helpful. The two broad groups of models reflect the two major approaches to legislative remedies based on *Serrano:* on the one hand, full state assumption of costs, and, on the other, "power equalizing." The numbers within the models are arbitrary.

Three Centralized Models:

[The state provides *all* funds from centralized tax sources. These sources might include income, property, value-added, sales, and/or any other taxable values or activities.]

Model #1—Equal Dollars Per Pupil

The state provides $750 per child in average daily enrollment (ADE). Legislation specifies the extent to which the spending units (e.g., districts or schools) can decide their own spending priorities.

Model #2—Equal Dollars Plus Cost Refinements

The state provides $600 per ADE plus:
$100 per student whose residence is two miles or more distant from school
$100 per student for districts in areas in which there are high costs for goods and services
$100 per student in areas with high density (to account for "municipal overburden"—the presumed but difficult to document higher cost levels per capita for non-education public services in high-density areas).
Again, the legislature sets the limits, if any, of the spending unit's discretion in the allocation of its budget.

Model #3—Dollar Preferences for Specific Student Types Plus Cost Refinements

Each student in the spending unit is assigned a specific dollar value:
$600 per average student
$1000 per underachieving student
$2000 per blind student
$1200 per gifted student + the categorical aids in Model #2 for district cost differences.

Two De-Centralized Models:

[The state provides a flat grant representing a basic adequate minimum level of spending. Districts add on by a local tax which is "power equalized," so that any given rate means the same spendable dollars in every similar district.]

Model #4—State Flat Grant Plus Local Add-On

The state supplies $700 per ADE from central sources, as in Model #1. Each district may add on from $25 to $500 per ADE according to the rule that for each additional tax mill ($.001) on $100 taxable value of local property, an additional $25 per pupil may be *spent*. If a mill raises less than $25 per pupil (i.e., in districts with valuation below $25,000 per pupil) the state makes up the difference; if it raises above $25, the excess is redistributed as part of the state subvention to poorer districts. Thus, if a rich district and a poor each add 16 mills to its rate, each could spend a total of $1100 per pupil.

Model #5—Flat Grant, Plus Add-Ons, Plus State Categorical Aid for Costs and for Specific Student Types

The first two parts of this model are identical to Model #4. In addition the state provides specific aids for any number of imaginable cost adjustments or policy preferences. Examples appear in Models #2 and #3. If desired, such adjustments can, through other adjustments in the aid formula, be included within the power equalized add-on instead of being paid in flat grants. For example, underachieving children can be counted twice.

It is also apparent that *Serrano* would permit decentralized family-based or "voucher" plans if they were fiscally neutral. The apparatus for such systems has been described elsewhere and will not be considered here.[46]

Objections to De-Centralized Systems

Objection to power equalized models such as #4 and #5 will come from at least three quarters: (1) large-unit egalitarians who object to giving groups of local voters any control over spending for the education of children; (2) technicians who deny the possibility of setting up a system which is truly wealth-neutral; (3) tax resisters who fear that power equalization implies grossly inflated expenditure.[47]

The first group notes that tax-sensitive voters may tend to cluster (e.g. older persons with fixed incomes and no children). These critics would prefer the security of a state mandated uniformity of spending which, as they view it, would be more education-oriented and less arbitrary. The responses to this objection of those who prefer local control over state-mandated uniformity are too many to try to cover here. Generally those who prefer local control emphasize that statewide uniformity, as well as local control, is a compromise among public and private priorities. Since there is no choice but to submit children to the political process, one might as well leave that process close to home where judgments about educational needs and efficiency on the one hand and non-educational priorities on the other can be made in a context of particular children and real alternative needs of the community. This argument finds its apotheosis in family choice or "voucher" systems. Policy conflicts between the decentralizers and this first group of critics—the large-unit egalitarians—tend to focus upon conflicting philosophies of government and education, diverse views of the efficacy of money spent on schools, and disputes over what is politically possible.

The second group of critics raises a more technical objection to local choice. They doubt whether it is possible to establish fiscal neutrality or know when it exists. Realistically, there are many subtle forms of "wealth" difference in addition to differences in the value of taxable property per pupil; to equalize assessed valuation per pupil does not necessarily equalize fiscal capacity. If in a decentralized ("power equalized") district system differences in spending exist, and if, for example, spending is higher in districts with higher personal incomes, how would an objective observer determine whether taste, wealth, or some other factor is responsible?

The answers are of several kinds. The first is a simple confession and avoidance. Assessed valuation may be a defective measure of education financing capacity, but a system in which such valuation is equalized per pupil at least eliminates the *explicit* gross wealth differences that now exist. Such a change is radically superior to no change at all. Another answer would stress that the property tax can be enormously improved in its administration and is likely to be so improved under the spur of litigation.[48] If rationally and fairly administered, the property tax is tolerable and quite clearly constitutional. There is apparently no one, however, who doubts its regressivity. A third answer simply suggests that there are other and fairer measures of wealth which may be employed to measure local tax effort. The most obvious, of course, is the income tax.

The last group of objectors to power equalizing asserts that to let poor districts spend like rich districts (as in Models #4 and #5) will drive up the cost of education enormously. The answer is that it all depends on the particular taxing/spending formula the legislature chooses. If in Model #4 the local imposition of one additional mill would by statutory formula increase spending only $10, perhaps few would choose it; at $50 few might refuse it. This relation of tax effort to education spending also affects the amount of the subvention required; the aid formula can reasonably control cost to the degree desired by the state.

The Third Ring: Politics and Long-Run System Adjustments

What kinds of education finance systems will most states choose, as *Serrano* and its progeny begin to bring about large-scale change? Despite economic and political differences, it is possible to identify certain common pressures on the various state legislatures: not to reduce spending substantially or all at once in rich districts (through cutbacks, layoffs, salary reductions); not to increase local property tax; not to grossly increase total spending for education; not to eliminate local choice; not to cut back on high priority categories (such as aid to the poor); not to make a radical change in the structure and governance of public education. Despite these pressures, under a stimulus like *Serrano*, most states probably can increase somewhat the total amount of resources allocated to education. In addition, there is an unparalleled and probably popular opportunity to begin shifting the tax burden for financing education in phases from property to income.

These pressures are neither consistent nor avoidable. It is difficult for example, to have wealth neutrality in a decentralized model without increasing spending on public schools substantially or leveling some of the highest spending schools.

Assuming these conflicting pressures, we may expect that above a basic minimum the states will adopt relatively conservative compromises between cost control on the one hand and local control on the other. If forced to predict a typical solution we would select Model #5 above. Its structure permits a fair measure of local control, and, if the local tax and spending equivalents are carefully selected, can operate without bankrupting the state. This last caveat is crucial. The first order of business in each state should be economic analysis and model building in order to assure reasonable cost control over education.

All this assumes that most legislatures with deliberate speed will cooperate with a judicial decree. This seems a realistic prediction; for many reasons fiscal neutrality will be less painful to achieve than racial desegregation or even reapportionment. In addition to the power of voters in poor districts and that of the education establishment there will be other less obvious but substantial political support for implementing *Serrano*. A primary factor will be the self-interest of the bulk of school districts that cluster near the median in wealth. They can expect benefits from successful reform; what they can expect from unsuccessful reform is trouble. This makes them the staunch ally of the court. What such districts do not want is a prolonged period of turmoil and doubt in which aid formulas, validity of tax impositions, validity of bonds,[49] and retroactivity remain locked in a political struggle. The self-interest of these near-median-wealth districts lies in certainty, and they will be prepared to accept any reasonable legislative package that produces it.

Another important source of political support for the court may be the owners of industrial and commercial property in school districts of low wealth. For them the benefit is a reduction in property tax which can be translated into higher profit margins or at least an improvement of their market position relative to competitors now located in tax havens.[50] The combination of businessmen in poor districts and the residents of all but the wealthy districts might be a potent source of reform pressure, if organized. However, this alliance, not being traditional, concededly will be difficult to put together. Thus far there have been no businessmen friends of the court in the school finance cases; the self-interest of the businessman has not yet become sufficiently visible to him to evoke an active response in aiding these cases.[51]

What stance will most upper-middle income and upper income families, which can afford private education, take? Some say they will desert the public schools because the permissible spending levels in a post-*Serrano* system will be too low, and that they will then combine deliberately to shrink public education spending even further in order to convert their present public privilege into private education. These cries of alarm overlook present reality. The rich and near-rich who live in tax-wealthy districts already oppose state equalization, and, if their children attend public schools, it is only because these schools are in all essential respects private. If these families desert public education it is hard to see that much is lost. The important upper-income and upper-middle income families are those whose children are now in public school in districts of low and middling wealth. It is hard to believe that these families will desert the system they have historically chosen simply because it begins to spend more and cost them less. Rather, in those areas, it is at least as plausible that the improvements made possible by a post-*Serrano* education finance system will draw back into the public system those who have sought advantage for their children in hitherto better financed private schools.

What is not likely to develop is bedrock legislative or executive intransigence. The blessings of *Serrano* are too obvious and the risks too remote. Indeed, among the relevant public officials in California, irrespective of party, it is difficult to discover a critic of the *Serrano* result. The more common reaction is that this is what was always hoped for and the only surprise is that it took so long in coming. Two of the more prominent defendants have publicly declared their opposition to the state attorney general's seeking review by the U.S. Supreme Court. All this is not to say that the California legislature will promptly adopt a new and valid structure, though that is possible. It will not be easy for the legislator to bite the bullet so long as he retains the notion that the court might do it for him by mandating a specific remedy. Fortunately *Serrano* offers little hope of such direct judicial intervention in the reform process.[52]

Serrano and Other Public Services

Ultimately the idea of *Serrano* and *Van Dusartz* is intensely conservative, setting ethical limits upon the terms by which the state may dispose the fate of men. The *Serrano* principle is a fragment of the larger norm that, whatever other role government may play in society, it should never deliberately create privilege or burden without justification. This is perhaps a truism; regrettably it is also largely myth. One need only scan the spectrum of governmental activity within this country to discover its antithesis. Local government has not operated in this way since the 19th century, if ever. Some justify the result as variety, and no doubt variety can have its charms. To the poor district, however, the pattern is not the pied beauty of Joseph's coat but the ugliness of fiscal anarchy—an anarchy decreed by the state itself. The world of sub-governments—police, sewers, mosquito abatement—is a welter of privilege and impotence among governmental units responsible for the same function; the pattern is built and sustained by dependence of each unit upon collections of local property tax.

Serrano would withhold from the state this ability to create privilege and burden only as to education. However, the effect upon other governmental services cannot help but be substantial. This would be true even under a system of full state assumption of the cost of education; the burdens of providing police, parks, and libraries through the local property tax are complementary and would generally be eased in communities of low taxable property wealth.[53] Whether and how much the burden for those services would be increased in non-poor communities would be affected by both the level of school spending fixed by the state and by the state's choice of tax sources to support that level. It is hard to believe that spending for local non-educational functions would not be influenced.

Adoption of a power equalized school district system would have analogous but more complex effects on other public services. For example, assuming the same relative preferences for schools and parks that existed prior to adoption of such a system—and depending on the shape of the new school formula—a community's relative investment in the two functions could obviously be shifted. Power equalizing would alter the price of education for nearly all districts, and the interdependencies of local services would assert themselves in contrasting ways. That is, this all would happen unless the state either mandated or assumed the cost of other services beside education.

In fact there are certain to be pressures toward such comprehensive fiscal neutrality. The *Serrano* idea will increase sensitivity to abuses in respect to other public services, which have been long endured because of their apparent inevitability; this dissatisfaction will be further stimulated by economists and politicians, some of whom will promote full state assumption of all services, and others of whom will argue for power-equalizing these same functions. The Constitution is unlikely ever to impose a comprehensive rule upon the state, but, given diffusion of the *Serrano* message, the eventual achievement of full neutrality through the political process is not unthinkable.

Assuming such a development with respect to all services, what would be the outlook for survival of local control over government budgets? The answers tend to be polarized. On the one hand the desire for simple solutions may drive the system relentlessly toward homogeneity of spending through full state assumption. On the other hand the enduring human instinct for the familiar local community may find in *Serrano* a key to building true local control based upon an equality of unit power. States will no doubt follow various paths, including the paths of selectivity and compromise. It would, for example, be plausible for a state to power-equalize education (allowing significant local add-ons) while centralizing the funding of every other service. Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence.

There is plainly no answer to whether *Serrano* and its progeny will in behavioral terms produce an overall drift toward centralization. Indeed, in terms of true local autonomy it may as likely produce a renaissance of community control.[54] The principal argument against this outcome is that he who pays calls the tune. As we have seen, however, there is nothing in power-equalized systems requiring increased state subventions. Given a legislative commitment to redesign the basic system, it can be the local unit which bears the bulk of the cost, if that is desired.[55] No one can predict with confidence who will have the votes on that issue.

The Federal Role

Serrano's influence upon the federal role in education finance deserves at least brief consideration.[56] Ultimately *Serrano* should broaden federal involvement, and should bring some commitment to redressing interstate imbalance.[57] The emergence of visibly fair state financing systems can only heighten the incongruity of the present problem of interstate inequality. The policy analogies to the state/district relationship are close, and the legislative solutions are similar. Federal preemption of school spending or federal power equalizing of the states are possibilities in theory. In the latter solution states making the same proportional effort against their differing total wealths would be permitted to spend at the same level. Internally they would be free to adopt either monolithic or decentralized finance models. The imaginable ultimate would be exclusively federal funding of education through grants made directly to families and individuals, achieving simultaneously the quintessence of centralization and its opposite.[58]

CONCLUSION

In all this, we have assumed that *Serrano* will survive as constitutional law. It does not follow that judicial *quietus* would terminate its influence. The California court has revealed the emperor's nakedness; it becomes more difficult to overlook his patent ugliness. Perhaps the old order will remain tolerable, but it is risky to underestimate the educational effect of such a decision.

With or without the *imprimatur* of the United States Supreme Court, in a decade or two the influence of *Serrano* will merge readily into the flood of economic and social change. Discomfort to the political system will be minimized by *Serrano's* essential harmony with dominant values and mythology—with mythology because most of us imagine present reality to be roughly as *Serrano* requires it;[59] with values because most of us still object to the deliberate bestowal of unmerited privilege by government.

1. 5 Cal. 3d 584, 487 P. 2d 1241 (1971).

2. For purposes of the decision the court accepted assessed property valuation per pupil as the measure of district wealth. 5 Cal. 3d at 599. This is the measure implied in the proposed California enabling legislation and was the measure suggested by the complaint. Obviously assessed valuation of property may be an imprecise index of wealth in economists' terms. *See* note 48, *infra*. Further, there are presumably many influences upon spending other than wealth.

3. The rule is not *in haec verba*. The Court in *Serrano* stated that the infirmity of the California system was that "it makes the quality of a child's education a function of the wealth of his parents and neighbors." 5 Cal. 3d at 587. The Court in *Van Dusartz* v. *Hatfield*, No. 3–71 Civ. 243 (U.S.D.C. D.Minn., decided Oct. 12, 1971), 40 U.S.L.W. 2228 (Oct. 26, 1971), refined this formulation: "the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole."

4. *Ibid.*

5. 40 Law Week 2398 (Jan. 4, 1972). The Lawyers' Committee for Civil Rights Under Law in Washington, D.C. is now serving as a clearinghouse for *Serrano*-type litigation.

6. 28 U.S.C. § 1257. *See generally* Stern and Gressman, *Supreme Court Practice* (4th ed.), at 93–110 (1969).

7. In its decision on the petition for rehearing (Oct. 25, 1971).

8. ". . . [T]he designation given the judgment by state practice is not controlling." *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72 (1946).

9. It is, however, also possible that the trial will involve the issue of the alleged relation between spending and quality of education. 5 Cal. 3d at 599 (FN. 14), 601 (FN. 16). *See* text accompanying notes 28–30, *infra*.

10. This is an implied limitation of the Court's jurisdiction. ". . . If the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125–6 (1945). *See generally* Stern and Gressman, *supra* note 6, at 131–142; Wright, *Federal Courts* 487–92 (1970).

11. 5 Cal. 3d at 596 (FN. 11).

12. *See Dixon* v. *Duffy*, 342 U.S. 33 (1951), 343 U.S. 393 (1952), 344 U.S. 143 (1952); *Dep't of Mental Hygiene* v. *Kirchner*, 380 U.S. 194 (1965), 62 Cal. 2d 586, 400 P. 2d 321 (1965).

13. *Cramp* v. *Bd of Public Instruction*, 368 U.S. 278 (1961).

14. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968). Of course the California Court would still remain free to depart from the federal result on state grounds in a subsequent proceeding.

15. *See* Wright, *supra* note 10, at 196–208. In *Askew* v. *Hargrave*, 401 U.S. 476 (1971), the District Court had held that Florida's ceiling on local educational tax rates violated the equal protection clause because the limit discriminated against poor districts. The Supreme Court remanded because the trial court should have abstained while proceedings in the state courts, already initiated, determined the validity of the limit under the Florida Constitution.

16. The most prominent candidates are two Texas cases, *Guerra* v. *Smith*, No. 71–2857 (U.S.C.A. 5th Cir.), on appeal from the Western District of Texas (order below granting motion to dismiss dated July 20, 1971), and *Rodriguez* v. *San Antonio Indep. Sch. Dist.*, *supra* note 5.

17. Decided Aug. 13, 1971, 40 U.S.L.W. 2127 (Sept. 21, 1971).

18. *See* text accompanying notes 36–37, *infra*.

19. A decision reversing the refusal of the court below to order the convening of a three judge panel seems the nearest thing to a victory that is likely to emerge at this point.

20. For details of the following analysis *see* the opinion in *Serrano*, 5 Cal. 3d at 591–5.

21. Of course, the flat grant is not earmarked for rich districts, but is subtracted from the amount of aid going to districts receiving foundation aid. Thus, the grant is "ghost money" to poorer districts and may as well be earmarked for richer ones. *See Serrano*, 5 Cal. 3d at 595. Politically, in almost every state, such aid is a concession to richer districts.

22. On motions on the pleadings, *Serrano* plaintiffs' allegations of this pattern must be taken as true. However, the court goes further, finding the pattern itself by a combination of judicial notice, structural analysis, and illustrative examples. It is questionable whether any facts not subject to judicial notice are required. From official records, a persuasive series of graphs, tables and synthetic arguments is readily constructed. *See* Amici Brief for Urban Coalition and National Committee for Support of Public Schools, at 4–21.

23. For a general consideration of the doctrines, *see* Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L.R. 7 (1969).

24. *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

25. 5 Cal. 3d at 601.

26. *Id.* at 611. *See Van Dusartz*, *supra* note 3.

27. *See* Wise, *The California Doctrine*, Saturday Review, p. 78 (Nov. 20, 1971).

28. *See* the sources cited in *Serrano*, 5 Cal. 3d at 601 (FN. 16).

29. *Id.*

30. *Supra* note 3.

31. *See* text p. 117 , *infra*.

32. It does seem likely that *Serrano* will extend to those educational services in which the relation of wealth to spending is most obvious. Junior colleges are the most inviting target at least when they depend upon local property tax. The rest of higher education seems protected by the obscurity of the economic relations.

33. 397 U.S. 471 (1970).

34. 402 U.S. 137 (1970).

35. 5 Cal. 3d at 604–10. The *Valtierra* opinion, stark as it is, may be helpful to the *Serrano* principle in an unexpected way. As *Van Dusartz* puts it:

> Valtierra actually supports the "fundamentality" of the interest in education. The Court there emphasized the special importance of the democratic process exemplified in local plebiscites. That perspective here assists pupil plaintiffs who ask no more than equal capacity for local voters to raise school money in tax referenda, thus making the democratic process all the more effective. *See supra* note 3.

36. 5 Cal. 3d at 589.

37. Likewise the racial district wealth pattern may be other than intuition might suggest. In California over half the minority pupils reside in districts above the average in assessed valuation per pupil. Coons, Clune, and Sugarman, *Private Wealth and Public Education* 357 (1970).

38. There is no easy definition of the class. The *Serrano* complaint defines it as all pupils in all districts other than the wealthiest. Since this literally would include such districts as Beverly Hills among the injured class, there are evident

incongruities. However, there is no other completely logical line to draw.

39. 5 Cal. 3d at 603.

40. However, this involves the difficulty that there is no discrimination against the poor (children) but only *within* the class of poor.

41. F.Supp. (1971).

42. *Id.*

43. There seems no doubt that *Serrano* applies to capital costs; such expenditures have a relation to quality of education which *prima facie* is equal to that of current expenditures. Since many states have left the districts almost completely on their own to finance construction, the *Serrano* violation is *a fortiori*.

44. The *Serrano* court's brief discussion of "territorial uniformity" will doubtless cause confusion. The Court concludes that "if a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education." 5 Cal. 3d at 613. Some educators have taken this to imply that mandated statewide uniformity of spending may be required. *See* Wise, *supra* note 27. So construed, however, this brief utterance would render superfluous that four-fifths of the opinion devoted exclusively to establishing the less restrictive principle of fiscal neutrality. It would also accord the plaintiffs relief which they specifically disavowed in the briefs and arguments before the California Supreme Court. It should be added that during oral argument in *Serrano* several of the California justices voting with the majority indicated their strong objection to mandated uniformity. No doubt what the court intended was that a voter's residence should not affect the *taxable resources available* for his child's education. The *Van Dusartz* opinion so interprets *Serrano*. *See supra* note 3.

45. Gradual equalization of tax bases could altogether solve any problems of excessive cost to the state. This is not hard to accomplish in theory. First, if industrial and commercial property were removed from the local base and taxed at a uniform rate statewide, wealth disparities among districts would shrink enormously. In California the spectrum of district wealth would probably collapse to about 1/40th of its present range. If the wealthiest residential areas were then redistricted with the aim of a rough tax-base equalization, the substance of the problem could be removed. Ironically what would emerge is a fair system of school finance in which the state's role was effectively reduced to that of the provider of categorical aids for special costs and needs. With slight exaggeration such a system might be styled "full local funding."

46. The expression is from Coons, Clune, and Sugarman, *Private Wealth and Public Education, supra* note 37, at 202.

46a. *See* J. Coons and S. Sugarman, *Family Choice in Education* (1971).

47. There are, of course, other kinds of objections. For example, some boosters of educational spending fear that power equalizing would actually reduce spending because local voters (if they get the choice) will visit their tax frustrations upon the schools. Others argue that in large districts (*e.g.*, Los Angeles) there is no reality to "local" choice without decreasing the size of the effective school governance unit; however, such fragmentation may in turn complicate racial integration efforts.

48. A number of empirical attempts to measure local resources effectively have been attempted or are ongoing. *See* National Educational Finance Project, *Alternative Programs for Financing Education* 59–102 (1971). For a recent judicial reaction to discriminatory assessment practices *see Lee* v. *Boswell*, 40 Law Week 2060 (July 27, 1971).

49. *See Wall Street Journal*, p. 16 (Dec. 1, 1971).

50. One long term effect of *Serrano* could be to reduce the powerful incentive for industry to cluster in tax havens. Removal of this artificial market incentive might help stimulate new approaches to the problem of locating industry for the general convenience of mankind.

51. The primary opposition to reform will be residents (rich and poor) of wealthy districts and the industrial and commercial interests located therein. However, even legislators who have among the districts they represent some very rich ones may find it difficult to be truly obstructive, since they ordinarily represent eight or ten districts, a majority of which are likely to be of middle or low wealth.

52. In the *very* unlikely event of outright legislative defiance, the courts are in a much stronger position to have their way with fiscal neutrality than either desegregation or reapportionment. In addition to the obvious political risks run by obstructionists, the court's possible ability to close off tax support for unconstitutional systems could bring the legislature to heel. In this respect it is interesting that *Serrano* specifically recognized the taxpayer's right to enjoin the operation of an unconstitutional system. 5 Cal. 3d at 618.

53. This is true except where low district property value coincides with high personal income under a new structure in which the taxes employed by the state to fund the system are highly progressive. Thus a tax-poor middle class suburb with no industry would trade a substantial property tax rate for a substantial income tax rate.

54. *Serrano* will provide the long sought impetus to eliminate very small districts. At the same time it closes out the long movement for district consolidation by subsuming its rationale. If tax bases in a decentralized system *must* be effectively equivalent through power equalizing, there is no point in amalgamating districts beyond the point of increasing educational efficiency. Currently district gigantism is receiving low grades in this respect. H. Levin (ed.), *Community Control of Schools* 251–256 (1970). Coincidentally ethnic movements for fragmentation of school authority are growing. If fragmentation no longer means diminution of fiscal capacity, the community control movement has become economically credible. It is now difficult to justify the independence of a middle class suburb while rejecting community demands in the inner city. The relation of this seeming benefit to the problem of racial segregation is unclear, but *prima facie* it will make metropolitan integration plans more difficult.

55. *See supra* note 45.

56. A constitutional handle upon the federal government analogous to *Serrano* is credible in theory, but presently pointless in fact. The Fifth Amendment may do equal protection service, but there are no federal programs visibly dispensing money according to wealth. The Elementary and Secondary Education Act, 20 U.S.C. §§ 241a, 241c (Supp. 1968), could be a stunning exception, but its wealth categories are presumably intended only as surrogates for true educational need. As such they are probably viable. The more obvious example of effect on a federal program involves the so-called "impacted areas" legislation. 20 U.S.C. § 241 (1969). If states may not use districts of unequal capacity, this aid loses the supporting rationale of replacing taxable local wealth lost through federal enclaves. Presumably such aid would be given now where the impact was felt—at the state level—and only if the state were relying on property tax.

57. The nature of federal participation takes on increased significance from recent suggestions that a national value-added tax be levied to raise more than ten billion dollars annually for the support of public elementary and secondary education.

58. Of course, any voucher system would require protections against reintroduction of the influence of wealth differences. *See* J. Coons and S. Sugarman, *supra* note 46a.

59. We are personally acquainted with residents of wealthy districts who express personal grievance at the local property tax! With equal reason might General Motors complain of the necessity for building automobiles.

Appendix B

96 Cal.Rptr. 601

John SERRANO, Jr., et al., Plaintiffs and Appellants,

v.

Ivy Baker PRIEST, as State Treasurer, etc., et al., Defendants and Respondents.

L. A. 29820.

Supreme Court of California,
In Bank.
Aug. 30, 1971.
As Modified on Denial of Rehearing
Oct. 21, 1971.

Class actions brought by elementary and high school pupils and parents against certain state and county officials concerned with financing of California public school systems for declaratory judgment that California school financing scheme is unconstitutional and for injunctive relief. The Superior Court, Los Angeles County, Robert W. Kenny, J., granted defendants' motion for dismissal after plaintiffs' failure to amend following sustaining of demurrers and the plaintiffs appealed. The Supreme Court, Sullivan, J., held that public school financing system which relies heavily on local property taxes and causes substantial disparities among individual school districts in amount of revenue available per pupil for the districts' educational grants invidiously discriminates against the poor and violates the equal protection clause of the Fourteenth Amendment.

Judgment reversed and cause remanded with directions.

McComb, J., dissented and filed opinion.

Opinion, 10 Cal.App.3d 1110, 89 Cal. Rptr. 345, vacated.

1. Schools and School Districts ⚷148

Right to an education in public schools is fundamental interest which cannot be conditioned on wealth. U.S.C.A.Const. Amend. 14; West's Ann.Evid.Code, § 452 (c); West's Ann.Const. art. 9, § 6; West's Ann.Education Code, § 20701 et seq.

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SULLIVAN, Justice.

[1] We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

Plaintiffs, who are Los Angeles County public school children and their parents, brought this class action for declaratory and injunctive relief against certain state and county officials charged with administering the financing of the California public school system. Plaintiff children claim to represent a class consisting of all public school pupils in California, "except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California." Plaintiff parents purport to represent a class of all parents who have children in the school system and who pay real property taxes in the county of their residence.

Defendants are the Treasurer, the Superintendent of Public Instruction, and the Controller of the State of California, as well as the Tax Collector and Treasurer, and the Superintendent of Schools of the County of Los Angeles. The county officials are sued both in their local capacities and as representatives of a class composed of the school superintendent, tax collector and treasurer of each of the other counties in the state.

The complaint sets forth three causes of action. The first cause alleges in substance as follows: Plaintiff children attend public elementary and secondary schools located in specified school districts in Los Angeles County. This public school system is maintained throughout California by a financing plan or scheme which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil for the districts' educational programs. Consequently, districts with smaller tax bases are not able to spend as much money per child for education as districts with larger assessed valuations.

It is alleged that "As a direct result of the financing scheme * * * substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State * * * [Par.] The educational opportunities made available to children attending public schools in the Districts, including plaintiff children, are substantially inferior to the educational opportunities made available to children attending public schools in many other districts of the State * * *." The financing scheme thus fails to meet the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the California Constitution in several specified respects.[1]

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[1] The complaint alleges that the financing scheme:

"A. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the wealth of the children's parents and neighbors, as measured by the tax base of the school district in which said children reside, and

"B. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the

In the second cause of action, plaintiff parents, after incorporating by reference all the allegations of the first cause, allege that as a direct result of the financing scheme they are required to pay a higher tax rate than taxpayers in many other school districts in order to obtain for their children the same or lesser educational opportunities afforded children in those other districts.

In the third cause of action, after incorporating by reference all the allegations of the first two causes, all plaintiffs allege that an actual controversy has arisen and now exists between the parties as to the validity and constitutionality of the financing scheme under the Fourteenth Amendment of the United States Constitution and under the California Constitution.

Plaintiffs pray for: (1) a declaration that the present financing system is unconstitutional; (2) an order directing defendants to reallocate school funds in order to remedy this invalidity; and (3) an adjudication that the trial court retain jurisdiction of the action so that it may restructure the system if defendants and the state Legislature fail to act within a reasonable time.

All defendants filed general demurrers to the foregoing complaint asserting that none of the three claims stated facts sufficient to constitute a cause of action. The trial court sustained the demurrers with leave to amend. Upon plaintiffs' failure to amend, defendants' motion for dismissal was granted. (Code Civ.Proc., § 581, subd. 3.) An order of dismissal was entered (Code Civ.Proc., § 581d), and this appeal followed.

[2-4] Preliminarily we observe that in our examination of the instant complaint, we are guided by the long-settled rules for determining its sufficiency against a demurrer. We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 713, 63 Cal.Rptr. 724, 433 P.2d 732.) We also consider matters which may be judicially noticed. (*Id.* at p. 716, 63 Cal.Rptr. 724, 433 P.2d 732.) Accordingly, from time to time herein we shall refer to relevant information which has been drawn to our attention either by the parties or by our independent research; in each instance we judicially notice this material since it is contained in publications of state officers or agencies. (Board of Education of City of Los Angeles v. Watson (1966) 63 Cal.2d 829, 836, fn. 3, 48 Cal.Rptr. 481, 409 P.2d 481; see Evid. Code, § 452, subd. (c).)

I

We begin our task by examining the California public school financing system which is the focal point of the complaint's allegations. At the threshold we find a

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geographical accident of the school district in which said children reside, and

"C. Fails to take account of any of the variety of educational needs of the several school districts (and of the children therein) of the State of California, and

"D. Provides students living in some school districts of the State with material advantages over students in other school districts in selecting and pursuing their educational goals, and

"E. Fails to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources, and

"F. Perpetuates marked differences in the quality of educational services, equipment and other facilities which exist among the public school districts of the State as a result of the inequitable apportionment of State resources in past years.

"G. The use of the 'school district' as a unit for the differential allocation of educational funds bears no reasonable relation to the California legislative purpose of providing equal educational opportunity for all school children within the State.

"H. The part of the State financing scheme which permits each school district to retain and expend within that district all of the property tax collected within that district bears no reasonable relation to any educational objective or need.

"I. A disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided."

fundamental statistic—over 90 percent of our public school funds derive from two basic sources: (a) local district taxes on real property and (b) aid from the State School Fund.[2]

By far the major source of school revenue is the local real property tax. Pursuant to article IX, section 6 of the California Constitution, the Legislature has authorized the governing body of each county, and city and county, to levy taxes on the real property within a school district at a rate necessary to meet the district's annual education budget. (Ed.Code, § 20701 et seq.)[3] The amount of revenue which a district can raise in this manner thus depends largely on its tax base—i. e., the assessed valuation of real property within its borders. Tax bases vary widely throughout the state; in 1969–1970, for example, the assessed valuation per unit of average daily attendance of elementary school children[4] ranged from a low of $103 to a peak of $952,156—a ratio of nearly 1 to 10,000. (Legislative Analyst, Public School Finance, Part V, Current Issues in Educational Finance (1971) p. 7.)[5]

The other factor determining local school revenue is the rate of taxation within the district. Although the Legislature has placed ceilings on permissible district tax rates (§ 20751 et seq.), these statutory maxima may be surpassed in a "tax override" election if a majority of the district's voters approve a higher rate. (§ 20803 et seq.) Nearly all districts have voted to override the statutory limits. Thus the locally raised funds which constitute the largest portion of school revenue are primarily a function of the value of the realty within a particular school district, coupled with the willingness of the district's residents to tax themselves for education.

Most of the remaining school revenue comes from the State School Fund pursuant to the "foundation program," through which the state undertakes to supplement local taxes in order to provide a "minimum amount of guaranteed support to all districts * * *." (§ 17300.) With certain minor exceptions,[6] the foundation program ensures that each school district will receive annually, from state or local funds, $355 for each elementary school pupil (§§ 17656, 17660) and $488 for each high school student. (§ 17665.)

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[2] California educational revenues for the fiscal year 1968–1969 came from the following sources: local property taxes, 55.7 percent; state aid, 35.5 percent; federal funds, 6.1 percent; miscellaneous sources, 2.7 percent. (Legislative Analyst, Public School Finance, Part I, Expenditures for Education (1970) p. 5. Hereafter referred to as Legislative Analyst.)

[3] Hereafter, unless otherwise indicated, all section references are to the Education Code.

[4] Most school aid determinations are based not on total enrollment, but on "average daily attendance" (ADA), a figure computed by adding together the number of students actually present on each school day and dividing that total by the number of days school was taught. (§§ 11252, 11301, 11401.) In practice, ADA approximates 98 percent of total enrollment. (Legislative Analyst, Public School Finance, Part IV, Glossary of Terms Most Often Used in School Finance (1971) p. 2.) When we refer herein to figures on a "per pupil" or "per child" basis, we mean per unit of ADA.

[5] Over the period November 1970 to January 1971 the legislative analyst provided to the Legislature a series of five reports which "deal with the current system of public school finance from kindergarten through the community college and are designed to provide a working knowledge of the system of school finance." (Legislative Analyst, Part I, *supra*, p. 1.) The series is as follows: Part I, Expenditures for Education; Part II, The State School Fund: Its Derivation and Distribution; Part III, The Foundation Program; Part IV, Glossary of Terms Most Often Used in School Finance; Part V, Current Issues in Educational Finance.

[6] Districts which maintain "unnecessary small schools" receive $10 per pupil less in foundation funds. (§ 17655.5 et seq.)

Certain types of school districts are eligible for "bonus" foundation funds. Elementary districts receive an additional $30 for each student in grades 1 through 3; this sum is intended to reduce class size in those grades. (§ 17674.) Unified school districts get an extra $20 per child in foundation support. (§§ 17671–17673.)

The state contribution is supplied in two principal forms. "Basic state aid" consists of a flat grant to each district of $125 per pupil per year, regardless of the relative wealth of the district. (Cal.Const., art. IX, § 6, par. 4; Ed.Code, §§ 17751, 17801.) "Equalization aid" is distributed in inverse proportion to the wealth of the district.

To compute the amount of equalization aid to which a district is entitled, the State Superintendent of Public Instruction first determines how much local property tax revenue would be generated if the district were to levy a hypothetical tax at a rate of $1 on each $100 of assessed valuation in elementary school districts and $.80 per $100 in high school districts.[7] (§ 17702.) To that figure, he adds the $125 per pupil basic aid grant. If the sum of those two amounts is less than the foundation program minimum for that district, the state contributes the difference. (§§ 17901, 17902.) Thus, equalization funds guarantee to the poorer districts a basic minimum revenue, while wealthier districts are ineligible for such assistance.

An additional state program of "supplemental aid" is available to subsidize particularly poor school districts which are willing to make an extra local tax effort. An elementary district with an assessed valuation of $12,500 or less per pupil may obtain up to $125 more for each child if it sets its local tax rate above a certain statutory level. A high school district whose assessed valuation does not exceed $24,500 per pupil is eligible for a supplement of up to $72 per child if its local tax is sufficiently high. (§§ 17920–17926.)[8]

Although equalization aid and supplemental aid temper the disparities which result from the vast variations in real property assessed valuation, wide differentials remain in the revenue available to individual districts and, consequently, in the level of educational expenditures.[9] For exam-

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[7] This is simply a "computational" tax rate used to measure the relative wealth of the district for equalization purposes. It bears no relation to the tax rate actually set by the district in levying local real property taxes.

[8] Some further equalizing effect occurs through a special areawide foundation program in districts included in reorganization plans which were disapproved at an election. (§ 17680 et seq.) Under this program, the assessed valuation of all the individual districts in an area is pooled, and an actual tax is levied at a rate of $1 per $100 for elementary districts and $.80 for high school districts. The resulting revenue is distributed among the individual districts according to the ratio of each district's foundation level to the area-wide total. Thus, poor districts effectively share in the higher tax bases of their wealthier neighbors. However, any district is still free to tax itself at a rate higher than $1 or $.80; such additional revenue is retained entirely by the taxing district.

[9] Statistics compiled by the legislative analyst show the following range of assessed valuations per pupil for the 1969–1970 school year:

	Elementary	High School
Low	$103	11,959
Median	19,600	41,300
High	952,156	349,093

(Legislative Analyst, Part V, *supra*, p. 7.)

Per pupil expenditures during that year also varied widely:

	Elementary	High School	Unified
Low	$407	$722	$612
Median	672	898	766
High	2,586	1,767	2,414

(*Id.* at p. 8.)

Similar spending disparities have been noted throughout the country, particularly when suburban communities and urban ghettos are compared. (See, e. g., Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1968) pp. 434–436; U. S. Commission on Civil Rights, Racial Isolation in the Public Schools (1967) pp. 25–31; Conant, Slums and Suburbs (1961) pp. 2–3; Levi, The University, The Professions, and the Law (1968) 56 Cal.L.Rev. 251, 258–259.)

ple, in Los Angeles County, where plaintiff children attend school, the Baldwin Park Unified School District expended only $577.49 to educate each of its pupils in 1968–1969; during the same year the Pasadena Unified School District spent $840.19 on every student; and the Beverly Hills Unified School District paid out $1,231.72 per child. (Cal. Dept. of Ed., Cal. Public Schools, Selected Statistics 1968–1969 (1970) Table IV-11, pp. 90–91. The source of these disparities is unmistakable: in Baldwin Park the assessed valuation per child totaled only $3,706; in Pasadena, assessed valuation was $13,706; while in Beverly Hills, the corresponding figure was $50,885—a ratio of 1 to 4 to 13. (*Id.*) Thus, the state grants are inadequate to offset the inequalities inherent in a financing system based on widely varying local tax bases.

Furthermore, basic aid, which constitutes about half of the state educational funds (Legislative Analyst, Public School Finance, Part II, The State School Fund: Its Derivation, Distribution and Apportionment (1970) p. 9), actually widens the gap between rich and poor districts. (See Cal. Senate Fact Finding Committee on Revenue and Taxation, State and Local Fiscal Relationships in Public Education in California (1965) p. 19.) Such aid is distributed on a uniform per pupil basis to all districts, irrespective of a district's wealth. Beverly Hills, as well as Baldwin Park, receives $125 from the state for each of its students.

For Baldwin Park the basic grant is essentially meaningless. Under the foundation program the state must make up the difference between $355 per elementary child and $47.91, the amount of revenue per child which Baldwin Park could raise by levying a tax of $1 per $100 of assessed valuation. Although under present law that difference is composed partly of basic aid and partly of equalization aid, if the basic aid grant did not exist, the district would still receive the same amount of state aid—all in equalizing funds.

For Beverly Hills, however, the $125 flat grant has real financial significance. Since a tax rate of $1 per $100 there would produce $870 per elementary student, Beverly Hills is far too rich to qualify for equalizing aid. Nevertheless, it still receives $125 per child from the state, thus enlarging the economic chasm between it and Baldwin Park. See Coons, Clune & Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures (1969) 57 Cal.L.Rev. 305, 315.)

II

[5] Having outlined the basic framework of California school financing, we take up plaintiffs' legal claims. Preliminarily, we reject their contention that the school financing system violates article IX, section 5 of the California Constitution, which states, in pertinent part: "The Legislature shall provide for *a system of common schools* by which a free school shall be kept up and supported in each district at least six months in every year * * *." (Italics added.)[10] Plaintiffs' argument is that the present financing method produces separate and distinct systems, each offering an educational program which varies with the relative wealth of the district's residents.

[6, 7] We have held that the word "system," as used in article IX, section 5, implies a "unity of purpose, as well as an entirety of operation; and the direction to the legislature to provide 'a' system of common schools means *one* system, which shall

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[10] Plaintiffs' complaint does not specifically refer to article IX, section 5. Rather it alleges that the financing system "fails to meet minimum requirements of the * * * fundamental law and Constitution of the State of California," citing several other provisions of the state Constitution. Plaintiffs' first specific reference to article IX, section 5 is made in their brief on appeal. We treat plaintiffs' claim under this section as though it had been explicitly raised in their complaint.

be applicable to all the common schools within the state." (Kennedy v. Miller (1893) 97 Cal. 429, 432, 32 P. 558, 559.) However, we have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade. (Piper v. Big Pine School Dist. (1924) 193 Cal. 664, 669, 673, 226 P. 926.)

We think it would be erroneous to hold otherwise. While article IX, section 5 makes no reference to school financing, section 6 of that same article specifically authorizes the very element of the fiscal system of which plaintiffs complain. Section 6 states, in part: "The Legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes, at rates * * * as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required * * *."

[8, 9] Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted. (People v. Western Airlines, Inc. (1954) 42 Cal.2d 621, 637, 268 P.2d 723, app. dism. (1954) 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677.) This maxim suggests that section 5 should not be construed to apply to school financing; otherwise it would clash with section 6. If the two provisions were found irreconcilable, section 6 would prevail because it is more specific and was adopted more recently. (*Id.*; County of Placer v. Aetna Cas., etc., Co. (1958) 50 Cal.2d 182, 189, 323 P.2d 753.) Consequently, we must reject plaintiffs' argument that the provision in section 5 for a "system of common schools" requires uniform educational expenditures.

III

[10] Having disposed of these preliminary matters, we take up the chief contention underlying plaintiffs' complaint, namely that the California public school financing scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.[11]

As recent decisions of this court have pointed out, the United States Supreme Court has employed a two-level test for measuring legislative classifications against the equal protection clause. "In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.]

"On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (Westbrook v.

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[11] The complaint also alleges that the financing system violates article I, sections 11 and 21, of the California Constitution. Section 11 provides: "All laws of a general nature shall have a uniform operation." Section 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." We have construed these provisions as "substantially the equivalent" of the equal protection clause of the Fourteenth Amendment to the federal Constitution. (Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal.Rptr. 329, 400 P.2d 321.) Consequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions.

Mihaly (1970) 2 Cal.3d 765, 784–785, 87 Cal.Rptr. 839, 852, 471 P.2d 487, 500, vacated on other grounds (1971) 403 U.S. 915, 91 S.Ct. 2224, 29 L.Ed.2d 692; In re Antazo (1970) 3 Cal.3d 100, 110–111, 89 Cal.Rptr. 255, 473 P.2d 999; see Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578–579, 79 Cal.Rptr. 77, 456 P.2d 645.)

A

Wealth as a Suspect Classification

[11, 12] In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain "suspect" personal characteristics. One factor which has repeatedly come under the close scrutiny of the high court is wealth. "Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored." (Harper v. Virginia State Bd. of Elections (1966) 383 U.S. 663, 668, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169.) Invalidating the Virginia poll tax in *Harper*, the court stated: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." (*Id.*) "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth * * * [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. [Citations.]" (McDonald v. Board of Election (1969) 394 U.S. 802, 807, 89 S.Ct. 1404, 1407, 22 L.Ed.2d 739.) (See also Tate v. Short (1971) 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130; Williams v. Illinois (1970) 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586; Roberts v. LaVallee (1967) 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41; Anders v. California (1967) 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493; Douglas v. California (1963) 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; Smith v. Bennett (1961) 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39; Burns v. Ohio (1959) 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209; Griffin v. Illinois (1956) 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; In re Antazo, *supra*, 3 Cal.3d 100, 89 Cal.Rptr. 255, 473 P.2d 999; see generally Michelman, The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment (1969) 83 Harv.L.Rev. 7, 19–33.)

Plaintiffs contend that the school financing system classifies on the basis of wealth. We find this proposition irrefutable. As we have already discussed, over half of all educational revenue is raised locally by leving taxes on real property in the individual school districts. Above the foundation program minimum ($355 per elementary student and $488 per high school student), the wealth of a school district, as measured by its assessed valuation is the major determinant of educational expenditures. Although the amount of money raised locally is also a function of the rate at which the residents of a district are willing to tax themselves, as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts. (See fn. 15, *infra*, and accompanying text.) For example, Baldwin Park citizens, who paid a school tax of $5.48 per $100 of assessed valuation in 1968–1969, were able to spend less than half as much on education as Beverly Hills residents, who were taxed only $2.38 per $100. (Cal. Dept. of Ed., op. cit. *supra*, Table III–16, p. 43.)

Defendants vigorously dispute the proposition that the financing scheme discriminates on the basis of wealth. Their first argument is essentially this: through *basic* aid, the state distributes school funds equally to all pupils; through *equalization* aid, it distributes funds in a manner beneficial to the poor districts. However, state funds constitute only one part of the entire school fiscal system.[12] The foundation program

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[12] The other major portion is, of course, locally raised revenue; it is clear that such revenue is a part of the overall educational financing system. As we pointed

partially alleviates the great disparities in local sources of revenue, but the system as a whole generates school revenue in proportion to the wealth of the individual district.[13]

Defendants also argue that neither assessed valuation per pupil nor expenditure per pupil is a reliable index of the wealth of a district or of its residents. The former figure is untrustworthy, they assert, because a district with a low total assessed valuation but a miniscule number of students will have a high per pupil tax base and thus appear "wealthy." Defendants imply that the proper index of a district's wealth is the total assessed valuation of its property. We think defendants' contention misses the point. The only meaningful measure of a district's wealth in the present context is not the absolute value of its property, but the ratio of its resources to pupils, because it is the latter figure which determines how much the district can devote to educating each of its students.[14]

But, say defendants, the expenditure per child does not accurately reflect a district's wealth because that expenditure is partly determined by the district's tax rate. Thus, a district with a high total assessed valuation might levy a low school tax, and end up spending the same amount per pupil as a poorer district whose residents opt to pay higher taxes. This argument is also meritless. Obviously, the richer district is favored when it can provide the same educational quality for its children with less tax effort. Furthermore, as a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts. (Legislative Analyst, Part V, *supra*, pp. 8–9.) Thus, affluent districts can have their cake and eat it too: they can provide a high quality educa-

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out, *supra*, article IX, section 6 of the state Constitution specifically authorizes local districts to levy school taxes. Section 20701 et seq. of the Education Code details the mechanics of this process.

[13] Defendants ask us to follow Briggs v. Kerrigan (D.Mass.1969) 307 F.Supp. 295, affd. (1st Cir. 1970) 431 F.2d 967, which held that the City of Boston did not violate the equal protection clause in failing to provide federally subsidized lunches at all of its schools. The court found that such lunches were offered only at schools which had kitchen and cooking facilities. As a result, in some cases the inexpensive meals were available to well-to-do children, but not to needy ones.

We do not find this decision relevant to the present action. Here, plaintiffs specifically allege that the allocation of school funds systematically provides greater educational opportunities to affluent children than are afforded to the poor. By contrast, in *Briggs* the court found no wealth-oriented discrimination: "There is no pattern such that schools with lunch programs predominate in areas of relative wealth and schools without the program in areas of economic deprivation." (*Id.* at p. 302.)

Furthermore, the nature of the right involved in the two cases is very different. The instant action concerns the right to an education, which we have determined to be fundamental. (See *infra*.) Availability of an inexpensive school lunch can hardly be considered of such constitutional significance.

[14] Gorman Elementary District in Los Angeles County, for example, has a total assessed valuation of $6,063,965, but only 41 students, yielding a per pupil tax base of $147,902. We find it significant that Gorman spent $1,378 per student on education in 1968–1969, even more than Beverly Hills. (Cal.Dept. of Ed., op. cit. *supra*, table IV–11, p. 90.)

We realize, of course, that a portion of the high per-pupil expenditure in a district like Gorman may be attributable to certain costs, like a principal's salary, which do not vary with the size of the school. On such expenses, small schools cannot achieve the economies of scale available to a larger district. To this extent, the high per-pupil spending in a small district may be a paper statistic, which is unrepresentative of significant differences in educational opportunities. On the other hand, certain economic "inefficiencies," such as a low pupil-teacher ratio, may have a positive educational impact. The extent to which high spending in such districts represents actual educational advantages is, of course, a matter of proof. (See fn. 16, *infra*.) (See generally Hobson v. Hansen (D.D.C. 1967) 269 F.Supp. 401, 437, affd. sub nom. Smuck v. Hobson (1969) 132 U.S.App.D.C. 372, 408 F.2d 175.)

tion for their children while paying lower taxes.[15] Poor districts, by contrast, have no cake at all.

Finally, defendants suggest that the wealth of a school district does not necessarily reflect the wealth of the families who live there. The simple answer to this argument is that plaintiffs have alleged that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents and we treat these material facts as admitted by the demurrers.

[13] More basically, however, we reject defendants' underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property

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[15] "In some cases districts with low expenditure levels have correspondingly low tax rates. In many more cases, however, quite the opposite is true; districts with unusually low figures have unusually high tax rates owing to their limited tax base." (Legislative Analyst, Part V, *supra*, p. 8.) The following table demonstrates this relationship:

COMPARISON OF SELECTED TAX RATES AND EXPENDITURE LEVELS IN SELECTED COUNTIES
1968–1969

County	ADA	Assessed Value per ADA	Tax Rate	Expenditure per ADA
Alameda				
Emery Unified	586	$100,187	$2.57	$2,223
Newark Unified	8,638	6,048	5.65	616
Fresno				
Colinga Unified	2,640	$ 33,244	$2.17	$ 963
Clovis Unified	8,144	6,480	4.28	565
Kern				
Rio Bravo Elementary	121	$136,271	$1.05	$1,545
Lamont Elementary	1,847	5,971	3.06	533
Los Angeles				
Beverly Hills Unified	5,542	$ 50,885	$2.38	$1,232
Baldwin Park Unified	13,108	3,706	5.48	577

(*Id.* at p. 9.)

This fact has received comment in reports by several California governmental units. "[S]ome school districts are able to provide a high-expenditure school program at rates of tax which are relatively low, while other districts must tax themselves heavily to finance a low-expenditure program. * * * [Par.] One significant criterion of a public activity is that it seeks to provide equal treatment of equals. The present system of public education * * * in California fails to meet this criterion, both with respect to provision of services and with respect to the geographic distribution of the tax burden." (Cal. Senate Fact Finding Committee on Revenue and Taxation, op. cit. *supra*, p. 20.)

"California's present system of school support is based largely on a sharing between the state and school districts of the expenses of education. In this system of sharing, the school district has but one source of revenue—the property tax. Therefore, its ability to share depends upon its assessed valuation per pupil and its tax effort. The variations existing in local ability (assessed valuation per pupil) and tax effort (tax rate) present problems which deny equal educational opportunity and local tax equity." (Cal. State Dept. of Ed., Recommendations on Public School Support (1967) p. 69.) (Quoted in Horowitz & Neitring, Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State (1968) 15 U.C.L.A. L.Rev. 787, 806.)

is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments.[16] Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.

[14] Defendants, assuming for the sake of argument that the financing system does classify by wealth, nevertheless claim that no constitutional infirmity is involved because the complaint contains no allegation of purposeful or intentional discrimination. (Cf. Gomillion v. Lightfoot (1960) 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.) Thus, defendants contend, any unequal treatment is only de facto, not de jure. Since the United States Supreme Court has not held de facto school segregation on the basis of race to be unconstitutional, so the argument goes, de facto classifications on the basis of wealth are presumptively valid.

We think that the whole structure of this argument must fall for want of a solid foundation in law and logic. First, none of the wealth classifications previously invalidated by the United States Supreme Court or this court has been the product of purposeful discrimination. Instead, these prior decisions have involved "unintentional" classifications whose impact simply fell more heavily on the poor.

For example, several cases have held that where important rights are at stake, the state has an affirmative obligation to relieve an indigent of the burden of his own poverty by supplying without charge certain goods or services for which others must pay. In Griffin v. Illinois, *supra*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the high court ruled that Illinois was required to provide a poor defendant with a free transcript on appeal.[17] Douglas v. California, *supra*, 372 U.S. 353, 83 S.Ct. 814, 9

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[16] Defendants contend that different levels of educational expenditure do not affect the quality of education. However, plaintiffs' complaint specifically alleges the contrary, and for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true.

Although we recognize that there is considerable controversy among educators over the relative impact of educational spending and environmental influences on school achievement (compare Coleman, et al., Equality of Educational Opportunity (U.S. Office of Ed. 1966) with Guthrie, Kleindorfer, Levin & Stout, Schools and Inequality (1971); see generally Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. 305, 310–311, fn. 16), we note that the several courts which have considered contentions similar to defendants' have uniformly rejected them.

In McInnis v. Shapiro (N.D.Ill.1968) 293 F.Supp. 327, affd. mem. sub nom. McInnis v. Ogilvie (1969) 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308, heavily relied on by defendants, a three-judge federal court stated: "Presumably, students receiving a $1000 education are better educated that [*sic*] those acquiring a $600 schooling." (Fn. omitted.) (*Id.* at p. 331.) In Hargrave v. Kirk (M.D.Fla. 1970) 313 F.Supp. 944, vacated on other grounds sub nom. Askew v. Hargrave (1971) 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196, the court declared: "Turning now to the defenses asserted, it may be that in the abstract 'the difference in dollars available does not necessarily produce a difference in the quality of education.' But this abstract statement must give way to proof to the contrary in this case." (*Id.* at p. 947.)

Spending differentials of up to $130 within a district were characterized as "spectacular" in Hobson v. Hansen, *supra*, 269 F.Supp. 401. Responding to defendants' claim that the varying expenditures did not reflect actual educational benefits, the court replied: "To a great extent * * * defendants' own evidence verifies that the comparative per pupil [expenditures] do refer to actual educational advantages in the high-cost schools, especially with respect to the caliber of the teaching staff." (*Id.* at p. 438.)

[17] Justice Harlan, dissenting in *Griffin*, declared: "Nor is this a case where the State's own action has prevented a defendant from appealing. [Citations.] All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action. [Par.] The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances." (351 U.S. at p. 34, 76 S.Ct. at p. 598.)

L.Ed.2d 811 held that an indigent person has a right to court-appointed counsel on appeal.

Other cases dealing with the factor of wealth have held that a state may not impose on an indigent certain payments which, although neutral on their face, may have a discriminatory *effect.* In Harper v. Virginia State Bd. of Elections, *supra,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, the high court struck down a $1.50 poll tax, not because its *purpose* was to deter indigents, from voting, but because its *result* might be such. (*Id.* at p. 666, fn. 3, 86 S.Ct. 1079.) We held in In re Antazo, *supra,* 3 Cal.3d 100, 89 Cal.Rptr. 255, 473 P.2d 999 that a poor defendant was denied equal protection of the laws if he was imprisoned simply because he could not afford to pay a fine. (Accord, Tate v. Short, *supra,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130; Williams v. Illinois, *supra,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586;[18] see Boddie v. Connecticut (1971) 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, discussed fn. 21, *infra.*) In summary, prior decisions have invalidated classifications based on wealth even in the absence of a discriminatory motivation.

[15] We turn now to defendants' related contention that the instant case involves at most de facto discrimination. We disagree. Indeed, we find the case unusual in the extent to which governmental action *is* the cause of the wealth classification. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. (Cf. San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, 956, 92 Cal.Rptr. 309, 479 P.2d 669.) Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. (Cal.Const., art. IX, § 14; Ed.Code, § 1601 et seq.; Worthington School Dist. v. Eureka School Dist. (1916) 173 Cal. 154, 156, 159 P. 437; Hughes v. Ewing (1892) 93 Cal. 414, 417, 28 P. 1067; Mountain View Union High School Dist. of Santa Clara County v. City Council (1959) 168 Cal.App.2d 89, 97, 335 P.2d 957.) Compared with *Griffin* and *Douglas,* for example, official activity has played a significant role in establishing the economic classifications challenged in this action.[19]

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[18] Numerous cases involving racial classifications have rejected the contention that purposeful discrimination is a prerequisite to establishing a violation of the equal protection clause. In Hobson v. Hansen, *supra,* 269 F.Supp. 401, Judge Skelly Wright stated: "Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme. [Par.] Theoretically, therefore, purely irrational inequalities even between two schools in a culturally homogeneous, uniformly white suburb would raise a real constitutional question." (Fns. omitted.) (*Id.* at p. 497.) (See also Hawkins v. Town of Shaw, Mississippi (5th Cir. 1971) 437 F.2d 1286; Norwalk CORE v. Norwalk Redevelopment Agency (2d Cir. 1968) 395 F.2d 920, 931.) No reason appears to impose a more stringent requirement where wealth discrimination is charged.

[19] One commentator has described state involvement in school financing inequalities as follows: "[The states] have determined that there will be public education, collectively financed out of general taxes; they have determined that the collective financing will not rest mainly on a statewide tax base, but will be largely decentralized to districts; they have composed the district boundaries, there-

Finally, even assuming arguendo that defendants are correct in their contention that the instant discrimination based on wealth is merely de facto, and not de jure,[20] such discrimination cannot be justified by analogy to de facto *racial* segregation. Although the United States Supreme Court has not yet ruled on the constitutionality of de facto racial segregation, this court eight years ago held such segregation invalid, and declared that school boards should take affirmative steps to alleviate racial imbalance, however created. (Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 881, 31 Cal.Rptr. 606, 382 P.2d 878; San Francisco Unified School Dist. v. Johnson, *supra,* 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669.) Consequently, any discrimination based on wealth can hardly be vindicated by reference to de facto racial segregation, which we have already condemned. In sum, we are of the view that the school financing system discriminates on the basis of the wealth of a district and its residents.

B

Education as a Fundamental Interest

But plaintiffs' equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests—rights of defendants in criminal cases (*Griffin; Douglas; Williams; Tate; Antazo*) and voting rights (*Harper*; Cipriano v. City Houma (1969) 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647; Kramer v. Union School District (1969) 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; cf. McDonald v. Board of Elections).[21] Plaintiffs' contention—that education is a fundamental interest which may not be conditioned on wealth—is not supported by any direct authority.[22]

[16] We, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of

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by determining wealth distribution among districts; in so doing, they have not only sorted education-consuming households into groups of widely varying average wealth, but they have sorted nonschool-using taxpayers—households and others—quite unequally among districts; and they have made education compulsory." His conclusion is that "[s]tate involvement and responsibility are indisputable." (Michelman, *supra,* 83 Harv.L. Rev. 7, 50, 48.)

[20] We recently pointed out the difficulty of categorizing *racial* segregation as either de facto or de jure. (San Francisco Unified School Dist. v. Johnson, *supra,* 3 Cal.3d 937, 956–957, 92 Cal.Rptr. 309, 479 P.2d 669.) We think the same reasoning applies to classifications based on wealth. Consequently, we decline to attach an oversimplified label to the complex configuration of public and private decisions which has resulted in the present allocation of educational funds.

[21] But in Boddie v. Connecticut, *supra,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, the Supreme Court held that poverty cannot constitutionally bar an individual seeking a divorce from access to the *civil* courts. Using a due process, rather than an equal protection, rationale, the court ruled that an indigent could not be required to pay court fees and costs for service of process as a precondition to commencing a divorce action.

[22] In Shapiro v. Thompson (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, in which the Supreme Court invalidated state minimum residence requirements for welfare benefits, the high court indicated, in dictum, that certain wealth discrimination in the area of education would be unconstitutional: "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program.

an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. "[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." (Note, Development in the Law—Equal Protection (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions—while not *legally* controlling on the exact issue before us—are persuasive in their accurate factual description of the significance of learning.[23]

The classic expression of this position came in Brown v. Board of Education (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, which invalidated de jure segregation by race in public schools. The high court declared: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made

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But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools." (*Id.* at p. 633, 89 S.Ct. at p. 1330.) Although the high court referred to actual exclusion from school, rather than discrimination in expenditures for education, we think the constitutional principle is the same. (See fn. 24, and accompanying text.)

A federal Court of Appeals has also held that education is arguably a fundamental interest. In Hargrave v. McKinney (5th Cir. 1969) 413 F.2d 320, the Fifth Circuit rule that a three-judge district court must be convened to consider the constitutionality of a Florida statute which limited the local property tax rate which a county could levy in raising school revenue. Plaintiffs contended that the statute violated the equal protection clause because it allowed counties with a high per-pupil assessed valuation to raise much more local revenue than counties with smaller tax bases. The court stated: "The equal protection argument advanced by plaintiffs is the crux of the case. Noting that lines drawn on wealth are suspect [fn. omitted] and that we are here dealing with interests which may well be deemed fundamental, [fn. omitted] we cannot say that there is no reasonably arguable theory of equal protection which would support a decision in favor of the plaintiffs. [Citations.]" (*Id.* at p. 324.)

On remand, a three-judge court held the statute unconstitutional because there was no rational basis for the discriminatory effect which it had in poor counties. Having invalidated the statute under the traditional equal protection test, the court declined to consider plaintiffs' contention that education was a fundamental interest, requiring application of the "strict scrutiny" equal protection standard. (Hargrave v. Kirk, *supra*, 313 F.Supp. 944.) On appeal, the Supreme Court vacated the district court's decision on other grounds, but indicated that on remand the lower court should thoroughly explore the equal protection issue. (Askew v. Hargrave (1971) 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196.)

[23] Defendants contend that these cases are not of precedential value because they do not consider education in the context of wealth discrimination, but merely in the context of racial segregation or total exclusion from school. We recognize this distinction, but cannot agree with defendants' conclusion. Our quotation of these cases is not intended to suggest that they *control* the legal result which we reach here, but simply that they eloquently express the crucial importance of education.

available to all on equal terms." (*Id.* at p. 493, 74 S.Ct. at p. 691.)

The twin themes of the importance of education to the individual and to society have recurred in numerous decisions of this court. Most recently in San Francisco Unified School Dist. v. Johnson, *supra*, 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669, where we considered the validity of an anti-busing statute, we observed, "Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society." (*Id.* at p. 950, 92 Cal.Rptr. at p. 316, 479 P.2d at p. 676.) Similarly, in Jackson v. Pasadena City School Dist., *supra*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878, which raised a claim that school districts had been gerrymandered to avoid integration, this court said: "In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis." (*Id.* at p. 880, 31 Cal.Rptr. at p. 609, 382 P.2d at p. 881.)

When children living in remote areas brought an action to compel local school authorities to furnish them bus transportation to class, we stated: "We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. [Citation.] And today an education has become the *sine qua non* of useful existence. * * * In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education." (Fn. omitted.) (Manjares v. Newton (1966) 64 Cal.2d 365, 375–376, 49 Cal.Rptr. 805, 812, 411 P.2d 901, 908.)

And long before these last mentioned cases, in Piper v. Big Pine School Dist., *supra*, 193 Cal. 664, 226 P. 926, where an Indian girl sought to attend state public schools we declared: "[T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges that cannot be denied." (*Id.* at p. 673, 226 P. at p. 930; see also Ward v. Flood (1874) 48 Cal. 36.) Although *Manjares* and *Piper* involved actual exclusion from the public schools, surely the right to an education today means more than access to a classroom.[24] (See Horowitz & Neitring, *supra*, 15 U.C.L.A. L.Rev. 787, 811.)

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote—two "fundamental interests" which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few." (Fn. omitted.) (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. 305, 362–363.)

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[24] Cf. Reynolds v. Sims (1964) 377 U.S. 533, 562-563, 84 S.Ct. 1362, 1382, 12 L.Ed.2d 506, where the Supreme Court asserted that the right to vote is impaired not only when a qualified individual is barred from voting, but also when the impact of his ballot is diminished by unequal electoral apportionment: "It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. * * * Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. * * * One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' [Citation.]" (Fn. omitted.)

The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights * * *." (Reynolds v. Sims, *supra*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed. 2d 506; see Yick Wo v. Hopkins (1886) 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220.) The drafters of the California Constitution used this same rationale—indeed, almost identical language—in expressing the importance of education. Article IX, section 1 provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (See also Piper v. Big Pine School Dist., *supra*, 193 Cal. 664, 668, 226 P. 926.) At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people * * * at once the symbol of our democracy and the most pervasive means for promoting our common destiny." (People of State of Ill. ex rel. McCollum v. Board of Education (1948) 333 U.S. 203, 216, 231, 68 S.Ct. 461, 468, 475, 92 L.Ed. 649 (Frankfurter, J., concurring).) In Abington School Dist. v. Schempp (1963) 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, it was said that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." (*Id.* at p. 230, 83 S.Ct. at p. 1576; Brennan, J., concurring.)[25]

We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest."[26]

First, education is essential in maintaining what several commentators have termed "free enterprise democracy"—that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.[27]

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[25] The sensitive interplay between education and the cherished First Amendment right of free speech has also received recognition by the United States Supreme Court. In Shelton v. Tucker (1960) 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, the court declared: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (*Id.* at p. 487, 81 S.Ct. at p. 251.) Similarly, the court observed in Keyishian v. Board of Regents (1967) 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629: "The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas * * *." (*Id.* at p. 603, 87 S.Ct. at p. 683.) (See also Tinker v. Des Moines School Dist. (1969) 393 U.S. 503, 512, 89 S.Ct. 733, 21 L.Ed. 2d 731; Epperson v. Arkansas (1968) 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228.)

[26] The uniqueness of education was recently stressed by the United States Supreme Court in Palmer v. Thompson (1971) 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438, where the court upheld the right of Jackson, Mississippi to close its municipal swimming pools rather than operate them on an integrated basis. Distinguishing an earlier Supreme Court de-

Second, education is universally relevant. "Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education * * *." (Fn. omitted.) (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at p. 388.)

Third, public education continues over a lengthy period of life—between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at p. 389.) "[T]he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up." (Hobson v. Hansen, *supra*, 269 F.Supp. 401, 483.)

Finally, education is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that "a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years." (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at p. 388.)

C

The Financing System is Not Necessary to Accomplish a Compelling State Interest

[17] We now reach the final step in the application of the "strict scrutiny" equal protection standard—the determination of

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cision which refused to permit the closing of schools to avoid desegregation, the court stated: "Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as 'perhaps the most important function of state and local governments.' Brown v. Board of Education, *supra*, 347 U.S. [483] at 493, 74 S.Ct. [686] at 691." (Id. at p. 221, 91 S.Ct. at p. 1943, fn. 6.) This theme was echoed in the concurring opinion of Justice Blackmun, who wrote: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." (*Id.* at p. 229, 91 S.Ct. at p. 1947.)

[27] In this context, we find persuasive the following passage from Hobson v. Hansen, *supra*, 269 F.Supp. 401, which held, inter alia, that higher per-pupil expenditures in predominantly white schools than in black schools in the District of Columbia deprived "the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children." (*Id.* at p. 406.)

"If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e. g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistibly calls for additional justification. What supports this call is * * * the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition * * *." (*Id.* at p. 508.) Although we realize that the instant case does not present the racial aspects present in *Hobson*, we find compelling that decision's assessment of the important social role of the public schools.

whether the California school financing system, as presently structured, is necessary to achieve a compelling state interest.

The state interest which defendants advance in support of the current fiscal scheme is California's policy "to strengthen and encourage local responsibility for control of public education." (Ed.Code, § 17300.) We treat separately the two possible aspects of this goal: first, the granting to local districts of effective decision-making power over the administration of their schools; and second, the promotion of local fiscal control over the amount of money to be spent on education.

The individual district may well be in the best position to decide whom to hire, how to schedule its educational offerings, and a host of other matters which are either of significant local impact or of such a detailed nature as to require decentralized determination. But even assuming arguendo that local administrative control may be a compelling state interest, the present financial system cannot be considered necessary to further this interest. No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts.

The other asserted policy interest is that of allowing a local district to choose how much it wishes to spend on the education of its children. Defendants argue: "[I]f one district raises a lesser amount per pupil than another district, this is a matter of choice and preference of the individual district and reflects the individual desire for lower taxes rather than an expanded educational program, or may reflect a greater interest within that district in such other services that are supported by local property taxes as, for example, police and fire protection or hospital services."

We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts. We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1,200. As defendants themselves recognize, perhaps the most accurate reflection of a community's commitment to education is the rate at which its citizens are willing to tax themselves to support their schools. Yet by that standard, Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2.

In summary, so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.

It is convenient at this point to dispose of two final arguments advanced by defendants. They assert, first, that territorial uniformity in respect to the present financing system is not constitutionally required; and secondly, that if under an equal protection mandate relative wealth may not determine the quality of public education, the same rule must be applied to all tax-supported public services.

[18] In support of their first argument, defendants cite Salsburg v. Maryland (1954) 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 and Board of Education v. Watson, *supra*, 63 Cal.2d 829, 48 Cal.Rptr. 481, 409 P.2d 481. We do not find these decisions apposite in the present context, for neither of them involved the basic constitutional

interests here at issue.[28] We think that two lines of recent decisions have indicated that where fundamental rights or suspect classifications are at stake, a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause. (See Horowitz & Neitring, *supra*, 15 U.C.L.A. L.Rev. 787.)

The first group of precedents consists of the school closing cases, in which the Supreme Court has invalidated efforts to shut schools in one part of a state while schools in other areas continued to operate. In Griffin v. County School Board (1964) 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 the court stated: "A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature 'having in mind the needs and desires of each.' Salsburg v. Maryland, *supra*, 346 U.S., at 552, 74 S.Ct., at 284. * * * But the record in the present case could not be clearer that Prince Edward's public schools were closed * * * for one reason, and one reason only: to ensure * * * that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one * * *." (*Id.* at p. 231, 84 S.Ct. at p. 1233.)

Similarly, Hall v. St. Helena Parish School Board (E.D.La.1961) 197 F.Supp. 649, affd. mem. (1962) 368 U.S. 515, 82 S.Ct. 529, 7 L.Ed.2d 521 held that a statute permitting a local district faced with integration to close its schools was constitutionally defective, not merely because of its racial consequences: "More generally, the Act is assailable because its application in one parish, while the state provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race. * * * [A]bsent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds." (Fn. omitted.) (*Id.* at pp. 651, 656.)

The *Hall* court specifically distinguished *Salsburg* stating: "The holding of Salsburg v. State of Maryland permitting the state to treat differently, for different localities, the rule against admissibility of illegally obtained evidence no longer obtains in view of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 [6 L.Ed.2d 1081]. Accordingly, reliance on that decision for the proposition that there is no constitutional inhibition to geographic discrimination in the area of civil rights is misplaced. * * [T]he Court [in *Salsburg*] emphasized that the matter was purely 'procedural' and 'local.' Here, the substantive classification is discriminatory * * *." (*Id.* at pp. 658–659, fn. 29.)

In the second group of cases, dealing with apportionment, the high court has held that accidents of geography and arbitrary boundary lines of local government can afford no ground for discrimination among a state's citizens. (Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined (1968) 35 U.Chi.L.Rev. 583, 585; see also Wise, Rich

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[28] *Salsburg* upheld a Maryland statute which allowed illegally seized evidence to be admitted in gambling prosecutions in one county, while barring use of such evidence elsewhere in the state. But when *Salsburg* was decided, the Fourth and Fourteenth Amendments had not yet been interpreted to prohibit the admission of unlawfully procured evidence in state trials. (Mapp v. Ohio (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.) Consequently, the Supreme Court in *Salsburg* treated the Maryland statute as simply establishing a rule of evidence, which was purely procedural in nature. (346 U.S. at p. 550; see pp. 554–555, 74 S.Ct. 280 (Douglas, J., dissenting).)

In *Watson* we rejected a constitutional attack on a statute which required special duties of the tax assessor in counties with a population in excess of four million, even though we recognized that only Los Angeles County would be affected by the legislation. In both cases, the courts simply applied the traditional equal protection test and sustained the provision after finding some rational basis for the geographic classification.

Schools, Poor Schools: The Promise of Equal Educational Opportunity (1969) pp. 66-92.) Specifically rejecting attempts to justify unequal districting on the basis of various geographic factors, the court declared: "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race [citation] or economic status, Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. * * * The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." (Reynolds v. Sims, *supra*, 377 U.S. 533, 566, 567, 84 S.Ct. 1362, 1384, 12 L.Ed.2d 506.) If a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education.[29]

[19] Defendants' second argument boils down to this: if the equal protection clause commands that the relative wealth of school districts may not determine the quality of public education, it must be deemed to direct the same command to all governmental entities in respect to all tax-supported public services;[30] and such a principle would spell the destruction of local government. We unhesitatingly reject this argument. We cannot share defendants' unreasoned apprehensions of such dire consequences from our holding today. Although we intimate no views on other governmental services,[31] we are satisfied that,

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[29] Defendants also claim that permitting school districts to retain their locally raised property tax revenue does not violate equal protection because "[t]he power of a legislature in respect to the allocation and distribution of public funds is not limited by any requirement of uniformity or of equal protection of the laws." As an abstract proposition of law, this statement is clearly overbroad. For example, a state Legislature cannot make tuition grants from state funds to segregated private schools in order to avoid integration. (Brown v. South Carolina State Board of Education (D.S.C.1968) 296 F.Supp. 199, affd. mem. (1968) 393 U.S. 222, 89 S.Ct. 449, 21 L.Ed.2d 391; Poindexter v. Louisiana Financial Assistance Commission (E.D.La.1967) 275 F.Supp. 833, affd. mem. (1968) 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780.) The cases cited by defendants are inapplicable in the present context. Neither Hess v. Mullaney (9th Cir. 1954) 15 Alaska 40, 213 F.2d 635, cert. den. sub nom. Hess v. Dewey (1954) 348 U.S. 836, 75 S.Ct. 50, 99 L.Ed. 659, nor General American Tank Car Corp. v. Day (1926) 270 U.S. 367, 46 S.Ct. 234, 70 L.Ed. 635 involved a claim to a fundamental constitutional interest, such as education. (See Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at p. 371, fn. 184.)

[30] In support of this contention, defendants cite the following quotation from MacMillan Co. v. Clarke (1920) 184 Cal. 491, 500, 194 P. 1030, 1034, in which we upheld the constitutionality of a statute providing free textbooks to high school pupils: "[T]he free school system * * * is not primarily a service to the individual pupils, but to the community, just as fire and police protection, public libraries, hospitals, playgrounds, and the numerous other public service utilities which are provided by taxation, and minister to individual needs, are for the benefit of the general public." Whatever the case as to the other services, we think that in this era of high geographic mobility, the "general public" benefited by education is not merely the particular community where the schools are located, but the entire state.

[31] We note, however, that the Court of Appeals for the Fifth Circuit has recently held that the equal protection clause forbids a town to discriminate racially in the provision of municipal services. In Hawkins v. Town of Shaw, Mississippi, *supra*, 437 F.2d 1286, the court held that the town of Shaw, Mississippi had an affirmative duty to equalize such services as street paving and lighting, sanitary sewers, surface water drainage, water mains and fire hydrants. The decision applied the "strict scrutiny" equal protection standard and reversed the decision of the district court which, relying on the traditional test, had found no constitutional infirmity.

Although racial discrimination was the basis of the decision, the court intimated that wealth discrimination in the provision of city services might also be invalid: "Appellants also alleged the disas we have explained, its uniqueness among public activities clearly demonstrates that *education* must respond to the command of the equal protection clause.

We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiffs' complaint supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the equal protection of the laws.[32] If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional.

IV

Defendants' final contention is that the applicability of the equal protection clause to school financing has already been resolved adversely to plaintiffs' claims by the Supreme Court's summary affirmance in McInnis v. Shapiro, *supra*, 293 F.Supp. 327, affd. mem. sub nom. McInnis v. Ogilvie (1969) 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308, and Burruss v. Wilkerson (W.D.Va.1969) 310 F.Supp. 572, affd. mem. (1970) 397 U.S. 44, 90 S.Ct. 812, 25 L.Ed.2d 37. The trial court in the instant action cited *McInnis* in sustaining defendants' demurrers.

The plaintiffs in *McInnis* challenged the Illinois school financing system, which is similar to California's, as a violation of the equal protection and due process clauses of the Fourteenth Amendment because of the wide variations among districts in school expenditures per pupil. They contended that "*only* a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment." (Fn. omitted.) (293 F.Supp. at p. 331.)

A three-judge federal district court concluded that the complaint stated no cause of action "for two principal reasons: (1) the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' ***educational needs***, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable." (Fn. omitted.) (293 F.Supp. at p. 329.) (Italics added.) The court additionally rejected the applicability of the strict scrutiny equal protection

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criminatory provision of municipal services based on wealth. This claim was dropped on appeal. It is interesting to note, however, that the Supreme Court has stated that wealth as well as race renders a classification highly suspect and thus demanding of a more exacting judicial scrutiny. [Citation.]" (*Id.* at p. 1287, fn. 1.)

[32] The United States Commission on Civil Rights has stated that "[i]t may well be that the substantial fiscal and tangible inequalities which at present exist between city and suburban school districts * * * contravene the 14th amendment's equal protection guarantee." Relying on the quotation from Brown v. Board of Education, *supra*.—" 'where a State provides education, it must be provided to all on equal terms' "—the commission concluded that this passage "would appear to render at least those substantial disparities which are readily indentifiable—such as disparities in fiscal support, average per pupil expenditure, and average pupil-teacher ratios—unconstitutional." The commission also cited the reapportionment decisions and Griffin v. Illinois, *supra*, concluding, "Here, as in *Griffin*, the State may be under no obligation to provide the service, but having undertaken to provide it, the State must insure that the benefit is received by the poor as well as the rich in substantially equal measure. (U. S. Commission on Civil Rights, op. cit. *supra*, p. 261 fn. 282.)

standard and ruled that the Illinois financing scheme was rational because it was "designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools." (*Id.* at p. 333.) The United States Supreme Court affirmed per curiam with the following order: "The motion to affirm is granted and the judgment is affirmed." (394 U.S. 322, 89 S.Ct. 1197.) No cases were cited in the high court's order; there was no oral argument.[33]

Defendants argue that the high court's summary affirmance forecloses our independent examination of the issues involved. We disagree.

[20] Since *McInnis* reached the Supreme Court by way of appeal from a three-judge federal court, the high court's jurisdiction was not discretionary. (28 U.S.C. § 1253 (1964).) In these circumstances, defendants are correct in stating that a summary affirmance is formally a decision on the merits. However, the significance of such summary dispositions is often unclear, especially where, as in *McInnis*, the court cites no cases as authority and guidance. One commentator has stated, "It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari."[34] (D. Currie, The Three-Judge District Court in Constitutional Litigation (1964) 32 U. Chi.L.Rev. 1, 74, fn. 365.) Frankfurter and Landis had suggested earlier that the pressure of the court's docket and differences of opinion among the judges operate "to subject the obligatory jurisdiction of the court to discretionary considerations not unlike those governing *certiorari*." (Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929 (1930) 44 Harv.L.Rev. 1, 14.) Between 60 and 84 percent of appeals in recent years have been summarily handled by the Supreme Court without opinion. (Stern & Gressman, op. cit. *supra*, at p. 194.)[35]

[21] At any rate, the contentions of the plaintiffs here are significantly different from those in *McInnis*. The instant complaint employs a familiar standard which has guided decisions of both the United States and California Supreme Courts: discrimination on the basis of wealth is an inherently suspect classification which may be justified only on the basis of a compelling state interest. (See cases cited, part III, *supra.*) By contrast, the *McInnis* plaintiffs repeatedly emphasized "educational needs" as the proper standard for measuring school financing against the equal protection clause. The district court found this a "nebulous concept" (293 F. Supp. 327, 329, fn. 4)—so nebulous as to render the issue nonjusticiable for lack of "'discoverable and manageable standards.'"[36] (*Id.* at p. 335.) In fact, the nonjusticiability of the "educational needs" standard was the basis for the *McInnis* holding; the district court's additional treatment of the substantive issues was purely dictum. In this context, a Supreme Court affirmance can hardly be considered dispositive of the significant and complex constitutional questions presented here.[37]

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[33] The plaintiffs in *Burruss* attacked the constitutionality of the Virginia school financing scheme. The decision of the district court, which dismissed their complaint for failure to state a claim, was cursory, containing little legal reasoning and relying on McInnis v. Shapiro for precedent. Consequently, the parties to the instant action have centered their discussion on *McInnis*, and we follow suit.

[34] Although the Supreme Court affirmed the *McInnis* decision, rather than dismissing the appeal, Currie's statement is probably entirely applicable anyway. In upholding decisions of lower courts on appeal, the Supreme Court "will affirm an appeal from a federal court, but will dismiss an appeal from a state court 'for want of a substantial federal question.' Only history would seem to justify this distinction. * * *" (Stern & Gressman, Supreme Court Practice (4th ed. 1969) at p. 233.)

[35] Summary disposition of a case by the Supreme Court need not prevent the court from later holding a full hearing on the same issue. The constitutionality of compulsory school flag salutes is a case in point. For three successive years—in Leoles v. Landers (1937) 302 U.S. 656, 58 S.Ct. 304, 82 L.Ed. 507; Hering v. State Board of Education (1938) 303 U.S. 624, 58 S.Ct. 752, 82 L.Ed. 1087; and Johnson v. Deerfield (1939) 306 U.S. 621, 59 S.Ct. 791, 83 L.Ed. 1027—the Supreme Court summarily upheld lower court decisions which ruled such requirements constitutional. The very next year the high court granted certiorari in Minersville School District v. Gobitis (1940) 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, thereby providing for oral argument and a full briefing of the issue. Although in *Gobitis* it adhered to its earlier per curiam decisions, three years later the court reversed its position and ruled such requirements invalid. (West Virginia State Board of Education v. Barnette (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628.)

[22] Assuming, as we must in light of the demurrers, the truth of the material allegations of the first stated cause of action, and considering in conjunction therewith the various matters which we have judicially noticed, we are satisfied that plaintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities among school districts in the amount of revenue available for education.

[23] The second stated cause of action by plaintiff parents by incorporating the first cause has, of course, sufficiently set forth the constitutionally defective financing scheme. Additionally, the parents allege that they are citizens and residents of Los Angeles County; that they are owners of real property assessed by the county; that some of defendants are county officials; and that as a direct result of the financing system they are required to pay taxes at a higher rate than taxpayers in many other districts in order to secure for their children the same or lesser educational opportunities. Plaintiff parents join with plaintiff children in the prayer of the complaint that the system be declared unconstitutional and that defendants be required to restructure the present financial system so as to eliminate its unconstitutional aspects. Such prayed for relief is strictly injunctive and seeks to prevent public officers of a county from acting under an allegedly void law. Plaintiff parents then clearly have stated a cause of action since "[i]f the * * * law is unconstitutional, then county officials may be enjoined from spending their time carrying out its provisions * * *." (Blair v. Pitchess (1971) 5 Cal.3d 258, 96 Cal.Rptr.

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[36] The plaintiffs in *Burruss* also relied on an "educational needs" standard in their attack on the Virginia school financing scheme, causing the district court to remark: "However, the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State." (310 F.Supp. at p. 574.)

[37] In a comprehensive article on equal protection and school financing, three commentators have stated: "The meaning of McInnis v. Shapiro is ambiguous; but the case hardly seems another Plessy v. Ferguson [163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256]. Probably but a temporary setback, it was the predictable consequence of an effort to force the court to precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready. * * * [T]he plaintiffs' virtual absence of intelligible theory left the district court bewildered. Given the pace and character of the litigation, confusion of court and parties may have been inevitable, foreordaining the summary disposition of the appeal. The Supreme Court could not have been eager to consider an issue of this magnitude on such a record. Concededly its per curiam affirmance is formally a decision on the merits, but it need not imply the Court's permanent withdrawal from the field. It is probably most significant as an admonition to the protagonists to clarify the options before again invoking the Court's aid." (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. at pp. 308–309.)

The Supreme Court's willingness to order a full hearing by a federal district court on the issues raised in Hargrave v. Kirk (see Askew v. Hargrave, *supra*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196), indicates to us that it does not consider the applicability of the equal protection clause to educational financing foreclosed by its decisions in *McInnis* and *Burruss.*

42, 486 P.2d 1242; Code Civ.Proc., § 526a.)[38]

[24] Because the third cause of action incorporates by reference the allegations of the first and second causes and simply seeks declaratory relief, it obviously sets forth facts sufficient to constitute a cause of action.

In sum, we find the allegations of plaintiffs' complaint legally sufficient and we return the cause to the trial court for further proceedings. We emphasize, that our decision is not a final judgment on the merits. We deem it appropriate to point out for the benefit of the trial court on remand (see Code Civ.Proc. § 43) that if, after further proceedings, that court should enter final judgment determining that the existing system of public school financing is unconstitutional and invalidating said system in whole or in part, it may properly provide for the enforcement of the judgment in such a way as to permit an orderly transition from an unconstitutional to a constitutional system of school financing. As in the cases of school desegregation (see Brown v. Board of Education (1955) 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083) and legislative reapportionment (see Silver v. Brown (1965) 63 Cal.2d 270, 281, 46 Cal. Rptr. 308, 405 P.2d 132), a determination that an existing plan of governmental operation denies equal protection does not necessarily require invalidation of past acts undertaken pursuant to that plan or an immediate implementation of a constitutionally valid substitute. Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect.

By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal immutable principle of natural law, or natural ethics,—a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man * * * which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all. * * *" (Original italics.) (Old South Leaflets V, No. 109 (1846) pp. 177–180 (Tenth Annual Report to Mass. State Bd. of Ed.), quoted in Readings in American Education (1963 Lucio ed.) p. 336.)

The judgment is reversed and the cause remanded to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time within which to answer.

WRIGHT, C. J., and PETERS, TOBRINER, MOSK and BURKE, JJ., concur.

McCOMB, Justice (dissenting).

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Dunn in the opinion prepared by him for the Court of Appeal in Serrano v. Priest, 10 Cal.App.3d 1110, 89 Cal.Rptr. 345.

Rehearing denied; McCOMB, J., dissenting.

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[38] Although plaintiff parents bring this action against state, as well as county, officials, it has been held that state officers too may be sued under section 526a. (Blair v. Pitchess, *supra*, 5 Cal.3d 258, 96 Cal.Rptr. 42, 486 P.2d 1242; California State Employees' Assn. v. Williams (1970) 7 Cal.App.3d 390, 395, 86 Cal.Rptr. 305; Ahlgren v. Carr (1962) 209 Cal.App.2d 248, 252–254, 25 Cal Rptr. 887.)

Appendix C

BOX SCORE

Oregon Case
1. Olsen v State of Oregon, was filed in the Lane County Circuit Court in 1972. Students of School District No. 40, Lane County, and Union High School District No. U-8J, Linn County, are challenging the Oregon school finance system. The case is still in the pleading stage and may not be heard prior to consideration of the *Rodriquez* case by the United States Supreme Court.

Reported Cases
Following *Serrano*

1. *Van Dusartz v Hatfield* 334 F Supp 870 (DC Minn 1971)

Three combined cases which were filed under the Civil Rights Act challenging the Minnesota school finance system under the state constitution and the Fourteenth Amendment of the United States Constitution. The defendants moved to dismiss on the grounds that no denial of equal protection was stated in the complaint. The court refused to dismiss the complaint and held that if the facts were established at trial as alleged in the complaint there would be a denial of equal protection. The court relied heavily upon the *Serrano* opinion. The court deferred further action in the case to allow the Minnesota legislature to act.

2. *Robinson v Cahill* 118 N. J. Super 223, 287 A2nd 187 (1972)

This was a case filed in state court attacking the New Jersey school finance system under the state constitution and the Fourteenth Amendment. The case was tried before a judge. On the basis of the testimony and evidence the court concluded that New Jersey School Districts with high assessed valuation spent more money per pupil but had lower tax rates and that there was a direct relationship between per pupil expenditure and quality of education. The court ruled that the school finance system violated both the state and federal constitutions. The decision was given prospective effect only, with the court stating that operation under the existing school finance laws would not be enjoined until January 1, 1974 to give the legislature time to act but, if no action had been taken prior to January 1, 1973, no state support moneys could be distributed to any local school districts.

In a later opinion the court adhered to its deadlines over objections by defendants as to the need for more time and the drastic effect of the ruling. See 119 N.J. Super, 40, 289 A2nd 569 (1972).

3. *Rodriquez v San Antonio Independent School District* 337 F Supp 280 (WD Tex. 1971); *Prob. juris. noted,* 406 US 966 (No. 71-1332, June 7, 1972)

This was a class action filed under the civil rights act on behalf of all children living in Texas School Districts with low property valuations. The case was heard before a three judge federal panel because it involved an attempt to restrain enforcement of state statutes. After trial the court unanimously decided that the Texas system violated the Fourteenth Amendment and the Texas Constitution. The court permanently enjoined defendants from operating under the existing Texas school finance laws but suspended affect of the injunction for two years, until December 23, 1973, to allow the state legislature to act.

Under the statute authorizing a three judge court, appeal is directly to the United States Supreme Court. The appeal has been filed in the Supreme Court and probable jurisdiction noted. The case has not been set for argument but probably will be the case in which the United States Supreme Court considers the *Serrano* principle.

4. *Sweetwater County Planning Committee for the Organization of School Districts v Hinkle* 491 P2nd 1234 (Wyo. 1971)

This case arose out of a dispute as to reorganization of rural school districts in Sweetwater County, Wyoming under the Wyoming School District organization law. The county had combined a high valuation district with several other districts within the county and then modified this to have the high valuation district administered by another district. The decision was appealed to a Wyoming State trial court which decided that the county decision was unwise. The case was appealed to the Wyoming Supreme Court. The court stated that the problem arose because of inequities in property valuation in school districts and that it would not ignore this any longer. The court stated that the valuation equity could only be achieved on a statewide basis and retained jurisdiction of the case until after the Wyoming legislature met and adjourned in 1973. The court stated that until that time the county would operate under the old districting. The majority opinion did not mention the Serrano case.

In a later opinion the court apparently thought better of holding the Sweetwater County School District hostage to force the legislature to act. Upon agreement of all parties to a districting plan, the court relinquished jurisdiction but stated that if the legislature did not act in 1973 any aggrieved taxpayer could sue to raise the inequitable valuation issue. See 493 P2d 1050 (1972)

Reported Cases Rejecting *Serrano*

1. *Spano v Board of Education of Lakeland Central School District No. 1*, 68 Misc 2nd 804, 328 NYS 2d 229 (1972)

This was a declaratory judgment action filed in a New York state court to declare that the New York school finance system violated the state constitution and the Fourteenth Amendment. The trial court sustained a motion to dismiss the complaint for failure to state a denial of equal protection. The court did not take issue with the reasoning in the Serrano case relating to equal protection but felt that the prior cases where the United States Supreme Court had dismissed appeals questioning school financing without argument foreclosed the issue of validity of the New York system. (***McInnis v Oglivie*** 394 US 1197 (1969) and ***Burrus v Wilkerson*** 397 US 44 (1970). It refused to accept the conclusion of the *Serrano* court that the prior Supreme Court appeals were to a different issue and the dismissal without hearing by the Supreme Court was not conclusive.